No. 275.
Def. of Williams & Loomis
FILED
APR 15 1901
JAMES H. MCKENNEY
Clerk
D. C.

No. 275.

Filed April 15, 1901.

In the Supreme Court

OF THE

United States.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane.

In Error to the Supreme Court of the State of Kansas.

Brief and Argument for Defendant in Error.

A. L. Williams,
Overmyer, Mulvane & Gaulé, and
N. H. Loomis,
Attorneys for Defendant in Error.

Crane & Co., Topeka.

No. 275.

In the Supreme Court

OF THE

United States.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane.

Brief and Argument for Defendant in Error.

As COUNSEL for plaintiff in error state in their brief, this is a suit brought upon an injunction bond given in a Federal court. The case was brought in the District Court of Shawnee county, Kansas. Judgment was rendered in favor of plaintiff for $25,000. Of this amount the testimony shows that $16,000 was for attorneys' fees and the balance for expenses and interest, including interest on moneys tied up by the injunction. The judgment of the District Court was affirmed by the Supreme Court of the

State, and the case thereupon carried by writ of error to this court.

The opinion of the Kansas Supreme Court may be found in 61 Kans., p. 650. Also on page 280 of the record.

A full statement of the facts involved in this case, from Mr. Mulvane's standpoint, will be found on pages 1 to 17 of the brief filed in the Supreme Court of Kansas, which has been attached to and made a part of this brief.

Our principal contention in this case is, that the questions presented here for review were not properly saved by the record; but that if they were, they are questions of general law which will not be considered by this court on a writ of error directed to the Supreme Court of a State.

Before proceeding to a consideration of this subject we wish to call to the attention of the court all the points in the record with respect to which it was claimed in the State courts that a Federal question was involved.

In the amended answer found on page 245 of the record, defendant alleges that attorneys' fees cannot be recovered on the bond as damages, for the reason that the bond was given in the Federal court and attorneys' fees are not recognized as a proper element of damages upon injunction bonds in that court. We give herewith the statement of counsel asking leave to make the amendment, and the amendment as made:

"Mr. Smith: If the court please, we now desire leave to

amend our answer in respect to one fact, and that is simply to meet this question of attorneys' fees. We desire to state that this point was raised in the Federal court, and that under the law of the Federal courts attorneys' fees are not a proper measure of damages. I am very frank to tell the reason I do this. I want the record to show that there is a Federal question involved in this case. It will appear in the record at large, but it will more clearly appear, of course, if we put it in our answer." . . . "THE COURT: The amendment will be allowed."

"AMENDMENT TO ANSWER.

"This defendant further answering said petition of the plaintiff as amended, says, that under the laws of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon the law so as aforesaid, regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same.

"By reason whereof, this defendant submits that the said plaintiff ought not to have and recover anything in this action for or on account of attorneys' fees as a measure of his damages in the event he is entitled to recover herein."

On page 16 of the record counsel for Tullock made the following objection to testimony covering attorneys' fees:

"The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceedings in Federal courts attorneys' fees are not included."

Other objections to similar testimony were offered, but they all referred back to and were based upon the objection just quoted. These additional objections may be found on pages 18 and 19 of the record.

In the opinion of the Supreme Court of Kansas (pp. 280–282 of the record), it appears that the contention of Mr. Tullock with respect to the allowance of attorneys' fees is met and decided adversely to him. The language of the court is as follows (p. 282):

"The contentions in behalf of the plaintiff in error, stated in the order made by him, are, first, that attorneys' fees are not allowable as damages in a suit on an injunction bond given in a case in the Federal court, but that in the event of a dissolution of the injunction and the consequent occurrence of a liability upon the bond the court granting the injunction awards damages upon the bond in a proceeding ancillary to the injunction case. This was the main contention of Tullock, the surety on the bond, when the case was here before. It was fully considered then and held to be unfounded. No additional arguments have been advanced or additional authorities cited influencing us to take a different view of the question."

Nowhere else in the record will be found a statement wherein it appears that counsel were endeavoring to raise a Federal question, either by pleadings, objections to testimony, instructions, assignments of error, or otherwise.

Errors Complained Of.

The specification of errors set forth in the brief of plaintiff in error can all be grouped under three general heads, as follows: 1st. Errors with respect to the allowance of attorneys' fees as damages. 2d. Errors assigned upon the theory that the action was prematurely brought. 3d. Error in refusing to hold that Mr. Tullock, a surety, could not be held liable inasmuch as the injunction proceedings did not go to a final hearing in the courts, but were dismissed by the complainant upon a dissolution of the temporary injunction.

For convenience we will restate these propositions, giving at the same time the various points embraced under these general heads:

1. Error in allowing any attorneys' fees as an element of damages. (Specification 3, p. 17.)

(*a*) If allowed at all, it is claimed that attorneys' fees should only have been allowed for services rendered in procuring a dissolution of the temporary injunction. None should have been allowed for services rendered in the endeavor to prevent the granting of a temporary injunction. (Specification 4, p. 18.)

(*b*) It is claimed that there was a failure to separate fees for services rendered in connection with the injunc-

tion proceedings from those rendered generally in the case. (Specification 5, par. 1, p. 19.)

(*c*) It is claimed that there was a failure to separate the fees for services rendered Mulvane, from those rendered the other defendants. (Specification 5, par. 2, p. 19.)

(*d*) It is claimed that Mulvane was erroneously allowed damages for fees paid on account of services rendered other defendants in the case. (Specification 5, par. 3, p. 19.)

(*e*) It is claimed that the court erred in permitting proof and charge for payment of more than one attorney's fee to more than one attorney or firm of attorneys.

2. Error is asserted in that the court refused to hold that the action was prematurely brought. (Specification 8, p. 21.)

(*a*) It is also claimed that there was error in admitting as evidence of the fact that there was a final determination of the injunction proceedings, and that the action was not prematurely brought, the stipulation found on page 175 of the record, dismissing the injunction branch of the case. (Specification 6, p. 20.)

(*b*) It is claimed that there was error in instructing the jury that suit might be brought on the injunction bond upon the dismissal or abandonment of the injunction branch of the case, without waiting for the termination of the main action. (Specification 9, p. 21.)

3. Error is asserted in that the court refused to hold

that Mr. Tullock, a surety, could not be held liable inasmuch as the injunction proceedings did not go to a final hearing in the courts, but were dismissed by the complainant after the dissolution of the temporary injunction. (Specification 7, p. 20.)

It will be observed from the foregoing and a careful inspection of the specifications of error, that no claim is made to the effect that the bond was not legal or was not binding upon the defendant, or that the court had no jurisdiction of the cause of action. The jurisdiction of the State court was conceded, and the only questions now presented for review are questions of general law passed upon by a State court in the exercise of its lawful powers.

Counsel devote considerable space in their brief to the proposition that the United States Circuit Court could have entertained original jurisdiction of this cause on the ground that a Federal question was involved; and the State Supreme Court is criticised for intimating that the Federal courts could not entertain jurisdiction of a suit upon the bond, inasmuch as the plaintiff and one of the defendants were citizens of the same State.

Be it as it may, with respect to the jurisdiction of the Federal court, it is certain that the State court had jurisdiction, and it does not follow from the fact that there may have been a Federal question in the case sufficient to give the U. S. Circuit Court original jurisdiction, that

there is now a Federal question involved in the record which will be reviewed by this court.

There are numerous cases, involving more than $5,000, which may be brought originally in the United States Circuit Court because of a Federal question involved, but which, if brought in the State court, could not be appealed to the Supreme Court of the United States.

Let us now take up the various specifications of error, determine whether they present any questions for review in this court; if so, whether the right to present them has been properly preserved; and if both questions should be answered in the affirmative, whether there is any reason for reversing the judgment of the State court.

I.

The Question as to whether Attorneys' Fees are a Proper Element of Damages in a Suit upon an Injunction Bond given in a Proceeding in the Federal Court, is a Question of General Law which a State Court has the right to finally Determine. Its Ruling thereon will not be Disturbed by this Court.

Section 709 of the Revised Statutes (section 25 of the Judiciary Act), providing for the review of judgments and decrees of State courts on writs of error, reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity, or where is drawn in question the validity, of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set apart or claimed by either party, under such Constitution, treaty, statute, commission or authority,— may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. . . ."

Plaintiff in error has failed to specify upon which clause of this section he relies for a reversal of the judgment of the State court. It is difficult to perceive how any of the errors alleged by him can come within the terms of the foregoing statute.

Counsel have labored very earnestly, however, to support the proposition that the measure of defendant's liability upon the injunction bond in question, is to be determined exclusively in accordance with the decisions of the Supreme Court of the United States; that inasmuch as the bond was given in a case pending in the United States court, there should be imported into the bond, and made a part of it, the decisions of the Supreme Court of the United States with respect to the measure of damages upon injunction bonds, in suits pending in the Federal courts.

We will concede for the sake of argument, that the powers of a United States court of equity with respect to compelling the giving of a bond as a condition of issuing an injunction, is as claimed by counsel, and that in the case of *Wescott & Hanson v. Mulvane*, the court could have granted the injunction without requiring a bond; that the court could have imposed such terms as it saw fit, as a condition precedent to the granting of the injunction. As a matter of fact, the court exercised its discretion, and upon the allowance of the temporary injunction provided for an injunction bond to protect the defendants. (See page 123 of Record.) After the order granting the injunction and providing for an injunction bond was made, the complainant obtained leave to deposit cash in lieu of a bond. (See page 124 of Record.) Thereafter leave was obtained by plaintiff to withdraw the cash deposit and to give a bond as originally contemplated by the court. (See pages 168–171 of Record.) The bond so given is the one sued on in this case.

There is no question but what the court had the power to demand the giving of this bond, that it was executed in accordance with the order of the court, and that it was one which could be sued upon in the State courts.

Now, it must be conceded that the construction to be placed upon the bond, and the measure of liability under it, must be determined in accordance with established rules of law. There are only two classes of law applicable

thereto: written or statutory law; unwritten or common law. As to the allowance of attorneys' fees, there is no written or statutory law upon the subject. The only law by which the question can be determined is the unwritten or common law. It is well known that the United States has no common law.

In the case of *Wheaton & Donaldson v. Peters & Griggs*, 8 Peters, 658, it was held as follows:

"It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.

"*When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.*"

The bond in question was given in the State of Kansas, and was to be performed there. The common law governing its construction, therefore, must necessarily be the common law of Kansas.

But whether the common law of the State, or the principles of common law generally, are to govern, the courts of the State, in actions pending before them, are clothed with full power to finally determine what the law is.

When the Federal court caused a bond to be executed which could be enforced in a State tribunal, it gave life to an obligation subject to the remedies of the court in

which suit might be brought, and requiring a construction conformable to the laws of the State where executed and to be performed.

Counsel argue that the construction of the bond in question should be determined exclusively by the decisions of this court. We claim that the obligations of the bond must be determined in accordance with the principles of the common law, and that the Supreme Court of the State is vested with absolute and final power to determine what the common law is.

The measure of damages upon an injunction bond is, in the absence of a statute governing the matter, a question of general law, and this court has decided, time and again, that it will not review the decisions of a State court upon questions of that sort.

In *Thorrington v. Smith*, 8 Wall. 1, this court reversing a judgment of the Circuit Court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the Circuit Courts of the United States. *Planters' Bank v. Union Bank*, 16 Wall. 483, 497; *Confederate Note Case*, 19 Wall. 548; *Wilmington & Weldon Railroad v. King*, 91 U. S. 3; *Cook v. Lillo*, 103 U. S. 792. Yet in *Bethel v. Demaret*, 10 Wall. 537, where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the

Supreme Court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by *the general law of the State*, this court dismissed the writ of error, holding that the authority conferred by a State on its Supreme Court to hear and determine cases, is not the kind of authority referred to in the 25th section of the Judiciary Act, which gives this court a right to review the decisions of the highest State court, where is drawn in question the validity of a statute of, *or an authority exercised under any State*, on the ground of their being repugnant to the Constitution, etc.; . . . and the decision is in favor of such validity. This court also held in that case that the decision of a State court which simply held that promissory notes, given for the loan of "Confederate currency" together with a mortgage to secure the notes, were nullities, on the ground that the consideration was illegal, according to the law of the State, at the time the contract was entered into, is not a decision repugnant to the Constitution.

In the case of *Delmas v. Insurance Company*, 14 Wall. 661, this court held that "On a writ of error to a State court, this court cannot revise a decision founded on the ground that a contract is void on the general principles of public policy or morality, when that is the only ground on which the contract is held to be void." In the course of the

opinion in that case, Mr. Justice MILLER used the following language:

"When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. *Like many other questions of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.*"

In the case of *United States v. Thompson et al.*, 93 U. S. 586, the United States presented for allowance, in insolvency proceedings against McFreely and Hopper, a claim in its favor, and asked that it be given preference over other creditors, on account of the priority given to debts due the United States by the act of March 3, 1797. The insolvency proceedings were pending in the Circuit Court of Queen Anne's county, Md. That court held that the claim of the United States had been paid, and decreed accordingly. The decree was affirmed by the Court of Appeals of Maryland. A writ of error was sued out to this court, but was dismissed on the ground that the decision of the State court was based upon *principles of general law* and would not be reviewed by this court. It was stated in the opinion that this court had no power to review decisions of the State courts upon questions of general law.

It will be noted that in the case last cited, the Federal courts would have had undoubted jurisdiction of the claim

of the United States in a direct suit upon it against McFreely and Hopper. Furthermore, if the State court had found that the claim was a subsisting one against the estate of McFreely and Hopper but that the United States was not entitled to the preference over other creditors, given by act of Congress, this court would have entertained jurisdiction of the case, upon writ of error, for the purpose of reviewing a decision of the State court of such a character. But as the case was decided upon a point of general law, this court refused to entertain jurisdiction.

So in the case at bar, if the State court had held the injunction bond void, because of a want of power in the court to require it, this court would have entertained jurisdiction for the purpose of reviewing its decision. But as the case comes to this court on a question as to the measure of damages under the injunction bond, which is a question of general law pure and simple, the decision of the State court upon it is not open to reconsideration in this court.

In the case of *New York Life Ins. Co. v. Hendren*, 92 U. S. 286, it was sought to have this court review the judgment of the Supreme Court of Appeals of Virginia; the point in issue being, the effect, under the general public law, of a state of sectional civil war upon a contract of life insurance. The case was dismissed for want of jurisdiction, the court holding that it could not pass upon

principles of general law decided by the State courts. In the course of the opinion of Mr. Chief Justice WAITE, the following language was used:

"Our jurisdiction over the decisions of the State courts is limited. It is not derived from the citizenship of the parties, but from the questions involved and decided. It must appear in the record, or we cannot proceed. We act upon questions actually presented to the court below, not upon such as might have been presented or brought into the case, but were not.

"The case, therefore, having been presented to the court below for decision *upon principles of general law alone*, and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction. We have often so decided. *Bethel v. Demaret*, 10 Wall. 537; *Delmas v. Insurance Co.*, 14 id. 666; *Tarver v. Keach*, 15 id. 67; *Rockhold v. Rockhold*, *supra*, p. 129."

See also:

Marrow v. Brinkley, 129 U. S. 178.
Sherman v. Grinnell, 144 U. S. 198.
New Orleans v. New Orleans Water Works Co., 142 U. S. 79.

But it may be urged that the cases cited are not in point, inasmuch as the bond in question was one given in a Federal court, and therefore the Supreme Court of the United States has inherent power to review all questions decided by the State court in a suit based upon such a bond. This is not the law. The Circuit Court of the United States may have original jurisdiction in cases of that nature, but this court can only review cases on writ of error to the State courts when the precise questions

presented to it come within the purview of section 25 of the Judiciary Act. Questions involving general principles of law are not covered by that section.

In the case of *Provident Savings Society v. Ford,* 114 U. S. 635, it was claimed that a question necessarily arose under the laws of the United States in a suit because it was brought upon a judgment rendered by a Federal court. This court held otherwise, and in the course of the opinion the following remarks were made upon the subject by Mr. Justice BRADLEY (p. 641):

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States — such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In the case of *Blackburn v. Portland Gold Mining Co.*,

175 U. S. 171, which was a contest between rival claimants of a mine under sections 2325 and 2326, Revised Statutes of the United States, it was held that the judgment of the Supreme Court of the State in such case could not be reviewed in this court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the case of *Florida Central and Peninsular Railroad Co. v. Bell*, 176 U. S. 321.

In the case of *De Lamar's Mining Co. v. Nesbitt*, 177 U. S. 523, it was held that "The fact that in a State court plaintiff and defendant make adverse claims to a mining location under the mining laws of the United States (Rev. Stat., sec. 2325), does not of itself present a Federal question within the meaning of Rev. Stat., sec. 709."

See also,—

Shoshone Mining Co. v. Rutter, 177 U. S. 505.

Carothers v. Mayer, 164 U. S. 325.

In the case of *Montgomery v. Hernandez*, 12 Wheat. 129, suit was brought by Hernandez *et al.* in a State court of Louisiana, upon the official bond of a United States marshal, to recover the proceeds of a vessel which the marshal had failed to turn over to the libellant in accordance with the order of the Federal court. One of the grounds of defense was, that as the bond was executed to the United States and the plaintiffs were no parties to it, they had no

right or interest in the bond, and could not sue for a breach of the condition thereof. Plaintiffs recovered a judgment in the trial court, which was affirmed by the Supreme Court of the State. On writ of error to this court it was held that this court had no power to review the decision of the State court as to the legality of permitting Hernandez to sue upon the bond in his own name. We quote from the opinion (p. 132):

"It has been insisted, for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States, for his use, is a question which can be re-examined in this court. We are not of that opinion. It is not every misconstruction of an act of Congress by a State court, that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege or exemption, under an act of Congress, and the decision is against such right, title, privilege or exemption.

"In this case the plaintiff in error did not, and could not claim any right, title, privilege or exemption, by, or under the marshal's bond, or any act of Congress giving authority to sue the obligors for a breach of the condition; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff.

"*However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to re-examine, and either reverse or affirm the decision of the State court on that ground.*"

In the case of *Lewis v. Campau*, 3 Wall. 106, it was

held that "A final judgment or decree by the highest court of law or equity of a State that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed, are insufficient — is not a subject for review by this court under the 25th section of the Judiciary Act of 1789." With respect to this matter the Chief Justice stated:

"Neither the validity of the statute nor its construction was in any way drawn in question. The only question the court had to pass upon, and this only incidentally as affecting the admissibility of evidence, was the value of the land. This is not a question which can be brought into this court under the 25th section of the Judiciary Act."

Avery v. Popper, 179 U. S. 305, was an action by a chattel mortgagee of certain cattle against the purchaser of the same at a marshal's sale upon execution issued out of a Federal court. The question at issue was whether a chattel mortgage upon a portion of such cattle, which did not identify the particular animals covered by it, was good as against the purchaser of the entire lot at marshal's sale. It was held that no Federal question was presented. In the course of the opinion this court, speaking through Mr. Justice Brown, said:

"This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. *Conceding that, if the question had arisen on appeal from a*

Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court whose opinion upon a question of general law is not reviewable here."

* * *

The question as to whether attorneys' fees can be recovered upon an injunction bond given in a Federal court was passed upon by the Supreme Court of California in the case of *Mitchell v. Hawley*, 21 Pac. Rep. 833, and answered in the affirmative. We quote from the opinion of the court:

"We cannot agree with counsel in the view that in an action brought in a court in this State, on an injunction bond given in a court in the United States, counsel fees can, in no instance, be recovered as damages, because such damages are not allowed by the Federal courts. Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond, if at all, in a Federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California, which was probably the fact, an action on the bond could probably not be maintained in a Federal court at all."

The same ruling was made in the case of *Hannibal etc. R. Co. v. Shepley*, 1 Mo. App. 254. The opinion of the court upon the point at issue reads as follows:

"In an action on a bond executed in an injunction suit in the United States Circuit Court, conditioned to pay all damages or costs that may be occasioned by the injunction, the word damages will be taken to include

reasonable counsel fees actually paid. Such a bond must be interpreted as any other contract, by the rules determined by the Supreme Court of Missouri; although a different interpretation may have been applied in cases by the Supreme Court of the United States. The rulings of the former are not merely authoritative; they are binding law in this State.

"It is argued by counsel for defendant in this case that as this bond was given in proceedings in equity of a Circuit Court of the United States, the obligation must be interpreted in view of the decisions of the Supreme Court of the United States, and the case is as if by statute of the United States it had been enacted that no counsel fees should be recovered in a suit on an injunction bond given in a Federal tribunal. A bond of this kind is to be interpreted by the rules that govern the interpretation of any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew by the interpretation put by the Supreme Court of Missouri upon the same obligation in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction."

To the same effect are the cases of —

Wash v. Lackland, 8 Mo. App. 122.

Elliott v. M. K. & T. Ry. Co., 77 Mo. App. 652.

Aiken v. Leathers, 40 La. Ann. 23.

* * *

A writ of error to a State court brings before the Supreme Court only the Federal questions in the case. None other will be considered.

Ashley v. Ryan, 153 U. S. 436, 440.

Barbier v. Connolly, 113 U. S. 27, 29.

Watson v. Mercer, 8 Pet. 88.

When the case was decided on an independent ground broad enough to maintain the judgment and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question.

Beatty v. Benton, 135 U. S. 244.

Marrow v. Brinkley, 129 U. S. 178.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

Bacon v. Texas, 163 U. S. 207.

Seneca Nation v. Christy, 162 U. S. 283.

Hammond v. Johnston, 142 U. S. 73.

* * *

Counsel for plaintiff in error cite in support of their contention that this court has jurisdiction, the cases of *Bein v. Heath*, 12 How. 168, and of *Meyers v. Block*, 120 U. S. 206.

In the case of *Bein v. Heath*, the Federal court required an injunction bond containing certain conditions. A bond was given in accordance with the State practice, containing other and different conditions. Under the conditions of the bond actually given, suit could not be brought against the obligors until the amount of the damages caused by the injunction had been ascertained in the original suit upon the dissolution of the injunction. This court held that a court of equity could not proceed to ascertain the amount of damages and render judgment against the obligors upon the dissolution of the injunction; that the

obligee must be left to proceed in a suit at law to recover his damages. The court further held, that as no judgment had been or could be rendered against the obligors upon the dissolution of the injunction and prior to the institution of the suit under consideration, the contingency on which the obligors agreed to pay had not happened, and that a suit could not be maintained upon the bond.

It will thus be seen that the questions involved in this court in that case went direct to the validity of the injunction bond, and that the decision in that case has no bearing upon the proposition now under consideration.

In the case of *Meyers v. Block*, an injunction bond was given in a proceeding in the Federal court in Louisiana, which was almost identical with the bond given in the case of *Bein v. Heath*. Plaintiffs in error sought to have this court follow the case of *Bein v. Heath*, and to render a similar judgment. This court refused to do so, and rendered judgment affirming the decision of the lower court. The case of *Bein v. Heath* was reviewed and distinguished. Among the assignments of error in the case of *Meyers v. Block* was the following one, which the court refused to sustain:

"The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the Federal court."

No question was raised in the case of *Meyers v. Block*

with respect to the jurisdiction of this court, and there is nothing decided in that case which is contrary to our contention in this case. As a matter of fact, the real question at issue in that case was as to the validity of the bond. The validity of the bond is not in controversy in the case at bar.

In the opinion of this court in the case of *Meyers v. Block*, this statement appears:

"The court not only construed the bonds in this way, but decided the cases upon this view as to their meaning and effect, *awarding to the plaintiffs respectively only such damages as arose from the effects of the respective injunctions.*"

In view of this statement of the court, it becomes a matter of interest to know whether or not attorneys' fees were allowed as an element of damages by the State court in that case. Neither the report of the case in this court nor in the Supreme Court of Louisiana throws any light upon the subject, and we have been unable to examine the record. However, there is information upon the subject in the case of *Aiken et al. v. Leathers et al.*, 40 La. Ann. 27, which we assume to be accurate. That was a suit in the State court upon an injunction bond given in the Federal court, and in it the question as to whether or not attorneys' fees constitute a proper element of damages was fully considered. The cases of *Bein v. Heath* and *Meyers v. Block*, as well as the case of *Oelrichs v. Spain*, were care-

fully considered, and the conclusion reached that attorneys' fees should be allowed as damages. In the course of the opinion reference was made to the damages allowed in the case of *Meyers v. Block,* and we call special attention to it:

"The conditions of the bond in the instant case was that the obligors would 'well and truly pay to Aiken all such damages as he may recover against us in case it should be decided that the injunction or restraining order was wrongfully obtained;' which is almost in terms precisely similar to the conditions in the bonds construed in the Block-Levi cases by the Supreme Court of the United States.

"*Now, a reference to the records of those cases shows that counsel fees were an element of damages, in the demand as well as in the proof.* Hence we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action *at law* in a Federal court, and *a fortiori* in a Louisiana court for the recovery of damages on a bond of injunction given in and by the order of a Federal court in an equity proceeding."

The question as to counsel fees being a proper element of damages upon an injunction bond, was also considered by the Supreme Court of Louisiana in the case of *Aiken et al. v. Leathers et al.,* reported in 37 La. Ann. 482, and a decision reached in favor of the allowance of such fees. In that case the court say:

"*This identical question was before us in Block v. Meyers, 35 Ann. 220, presented in the same form with reliance upon the same authority.*"

* * *

Counsel argue in favor of the jurisdiction of this court

upon the ground, among other things, that the United States Circuit Court had the power to modify the terms of the injunction order and bond. Conceding this power, it does not follow that this court has jurisdiction to review the decision of the State court on the measure of damages fixed by it in a suit upon the injunction bond. Counsel certainly do not mean to ask this court to modify the judgment of the State court because the Circuit Court may have had the power to change the terms of the injunction bond.

If relief were desired under a power of this sort, the Circuit Court should have been requested to make the modification desired. If it had done so, and the State court had refused to observe or give force to the changes made, then a case might have been made for this court. Nothing of this sort was attempted, and the State court could do nothing less than give effect to the bond as it stood.

II.

Even though this Court should be disposed to Review the Action of a State Court in allowing Attorney-Fees as an Element of Damages in a Suit upon an Injunction Bond given in a Federal Court, it will not do so in this case, as the Point was not Properly Preserved.

"To give this court jurisdiction to review the judgment of a State court under section 709, Rev. Stat., because of the denial by the State court of any title, right, privilege

or immunity, claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time, in the proper way."

Chappell v. Bradshaw, 128 U. S. 132.

In the case last cited, suit was brought to recover damages caused by permitting a burning scow to run against plaintiff's schooner, thereby burning and injuring it. Judgment was rendered in favor of plaintiff, which was affirmed by the Court of Appeals of Maryland. The defendant thereupon moved for a rehearing on the ground that the trial court should have *limited the measure of damages* to the value of the scow which occasioned the injury complained of, under the provisions of sec. 18, ch. 121, of the act of Congress of June 26, 1884. The Court of Appeals overruled the motion, inasmuch as this point had never been raised in the Circuit Court when the case was tried, nor before that court on appeal. Thereupon the case was brought to this court on writ of error. The case was dismissed by this court for the reasons above given.

For other cases holding that any title, right, privilege or immunity, claimed under the Constitution, etc., must be specially set up or claimed, see:

Leeper v. Texas, 139 U. S. 462.

Morrison v. Watson, 154 U. S. 111.

Winona &c. Land Co. v. Minnesota, 159 U. S. 540.

Zadig v. Baldwin, 166 U. S. 485.

Oxley Stave Co. v. Butler Co., 166 U. S. 648–655.

Not only must the right, title, privilege or immunity be set up, but it must be *specially* set up. That means that *the constitutional provision or the law relied upon* must be specified by the party claiming under it in the State court.

"In *Maxwell v. Newbold*, 18 How. 511, 516, which was a writ of error to the Supreme Court of Michigan, this court, speaking by Chief Justice Taney, and referring to the 25th section of the Judiciary Act of 1789, and the interpretation placed upon it in *Crowell v. Randall*, 10 Pet. 368, said: 'Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the State Circuit Court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly this did not preclude the plaintiffs in error from raising the point in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refers in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But *what* right did he claim under the Constitution of the United States which was denied him by the State court? *Under what clause of the Constitution* did he make his claim? And *what* right did he claim under an act of Congress? *And under what act*, in the wide range of our statutes, did he claim it? The record does not show; nor can this court undertake to determine that the question as to the faith and credit due to the record

and judicial proceedings in Ohio was made or determined in the State court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court.' After stating the grounds upon which the decision in *Lawler v. Walker*, 14 How. 149, was placed, the court proceeded: 'So in the case before us, *the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court*, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the State court.'"

In the case of *Messenger v. Mason*, 10 Wall. 507, objection was made in the State court to the introduction in testimony of the record of a judgment on the ground that the law under which the proceedings were had was unconstitutional and void. The certificate of the Supreme Court of Iowa to the record sent to this court certified that the validity of the law under which the said judgment was rendered, was drawn in question on the ground among other things that the same was in conflict with the Constitution of the United States. This court, following the decisions in *Maxwell v. Newbold*, 18 How. 511; *Lawler v. Walker et al.*, 14 How. 149; and *Hoyt v. Shelden*, 1 Black, 518, held that the constitutional objection was too general to be noticed on a writ of error under section 25 of the Judiciary Act.

In the case of *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 143, it was held that it was not necessary to

set forth the particular act of Congress or part of the Constitution relied on, in express words; that "the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See also,

Chapin v. Frye, 179 U. S. 127.

Now, is it possible to determine from the record in this cause that a certain clause of the Constitution or a certain law of the United States was relied upon by plaintiff in error in the State court? We have set out, *supra*, everything contained in the record in any way tending to show that a Federal question was relied upon. The most explicit assertion of the right is contained in the amendment to the answer, and for convenience we again quote from it:

"Under the law of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon the law so as aforesaid regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same."

There is absolutely nothing in the foregoing statement,

or in the record as a whole, to show that any particular Federal law or constitutional provision was relied upon by plaintiff in error. There is nothing even to show upon what decision or decisions of the Federal courts, reliance was placed.

The statements in the record in regard to a Federal question being involved with respect to the allowance of attorneys' fees, is altogether too general to come within the terms of section 25 of the Judiciary Act, requiring the right, title, privilege or immunity to be *specially* set up.

III.

The Questions presented as to whether Attorneys' Fees should have been allowed for resisting the Allowance of a Temporary Injunction; whether they were Properly Apportioned; whether Mulvane was improperly allowed for Fees paid on account of other Defendants; whether he was erroneously allowed for Fees paid to more than a single Attorney or firm of Attorneys,—are all Questions of General Law with which this Court will not interfere.

This proposition has been sufficiently discussed in connection with the general proposition as to whether this court will review the decision of the State court on the allowance of any attorneys' fees.

IV.

The Points relied upon with respect to the Allowance of Attorneys' Fees for resisting the granting of a Temporary Injunction; with respect to the Failure to properly apportion the Fees; and with respect to other matters set forth in our Third Proposition, supra, will not be considered by this Court, for the reason that they were Not Properly Preserved.

Nothing can be found in the record stating or even intimating that a Federal question was involved in any of these points. No Federal question was specially set up or claimed with respect to them.

V.

The Rulings of the State Court upon the Questions as to whether Attorneys' Fees should be allowed for resisting the granting of a Temporary Injunction; whether they were properly apportioned; whether Mulvane was improperly allowed for Fees paid on account of other Defendants; whether he was erroneously allowed for Fees paid to more than a single Attorney or firm of Attorneys,—were all correctly decided by the State Court.

ATTORNEYS' FEES FOR RESISTING THE GRANTING OF A TEMPORARY INJUNCTION.

(Specification 4, page 18.)

This point was not presented to the Supreme Court of Kansas on the last hearing. There is nothing in the rec-

ord to show that that court considered or passed upon it. There is no discussion of the subject in our brief, filed in that court, which is attached to and made a part of this brief. We give, however, a copy of that portion of our brief used on the first hearing, which relates to this particular matter:

Defendant in error insists that Mulvane can only recover attorneys' fees expended in obtaining a dissolution of the injunction — that he cannot recover fees paid for resisting its allowance, which is treated as an unsuccessful effort to obtain its dissolution.

We have taken occasion to look up some of the authorities in support of the proposition that attorneys' fees cannot be recovered for an unsuccessful attempt to obtain the dissolution of a temporary injunction. That point is not decided by the Supreme Court of California in the case of *Mitchell v. Hawley*, 21 Pac. Rep. 833. It merely refers to a couple of New York cases without affirming the point. The case of *Randall v. Carpenter*, 88 N. Y. 293, is based upon the case of *Newton v. Russell*, 87 N. Y. 527; that case upon this point follows *Allen v. Brown*, 5 Lans. 511. The case of *Allen v. Brown* follows the case of *Childs v. Lyons*, reported in 3 Robertson, 304. That is a report of the Superior Court of New York City. Not until the last-mentioned case is reached will the court find

any reason given for the rule referred to. We quote from the opinion of the court:

"I cannot see on what principle the costs of unsuccessful efforts to remove an injunction can be said to be damages arising from its existence. Costs and counsel fees on a successful motion to dissolve an injunction are considered the natural consequences of its existence, and are properly damages; but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed experiments to get rid of it. Any such a charge would be a premium upon the employment of unskillful counsel. Such items ought not properly enter into the estimate of damages upon the undertaking."

We submit that the reasoning of the court is not sound. If it be finally determined that the injunction ought not in the first instance to have been allowed, it is hardly proper to say that the defendant who is enjoined is not justified in making every possible effort to get rid of the injunction. He is not the party to blame if costs and expenses are incurred by reason of honest efforts on his part to obtain justice. It is rather the fault of the party who insists upon the allowance of the injunction, and of the court that erroneously refuses to dissolve the injunction. It is the duty of a person against whom an injunction is improperly granted to take prompt steps to protect himself therefrom. As said in Sutherland on Damages, vol. 2, p. 65:

"Where an injunction has been improvidently granted, or obtained without good cause, the defendant should take seasonable steps, probably, to relieve himself from its operation, and thus prevent damages. . . . The law sanctions a resort to appropriate means, and the employ-

ment of counsel is such, for obtaining relief from an injunction."

According to the doctrine of the cases cited, it makes no difference how erroneously an injunction may have been granted — the defendant is entitled to no compensation for fees paid attorneys in seeking to obtain a dissolution of the injunction, if the court before whom the motion is pending does not possess a sufficient knowledge of the law to correctly decide the case. The higher courts may afterwards determine that the party who was pressing the motion was correct in his contention and that the injunction should have been dissolved — that is a matter not to be considered. The reasoning seems strange, to say the least.

But the case at bar does not come within the range of those cases. The effort of Mulvane to obtain a dissolution of the injunction was a successful one, and it will hardly be contended that his resistance of the granting of the injunction in the first place comes within the category of "ill-directed experiments to get rid of it" (the injunction) referred to in the case reported in 3 Robertson. He certainly had the right, and it was his duty, to resist the granting of the injunction, and in this way avoid the damages which would be occasioned by its issuance.

Under the authorities it is very plain that plaintiff is entitled to recover for the full value of the services of his attorneys in and about the allowance and dissolution of

the temporary injunction, inasmuch as it was afterwards finally determined that the injunction was improperly issued.

In support of this, we cite the following:

Sutherland on Damages, vol. 2, p. 64, sec. 7.

"*Injunction Bonds. Scope of Obligation:* These are statutory obligations, and though various in their phraseology, they have a general similarity of purpose and effect, binding the obligors to pay all such damages, or costs and damages, as the party enjoined shall sustain in consequence of the injunction, if it shall be dissolved, or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues, there is a right to damages, first, *for costs and expenses incurred in defending against the writ*, and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers."

Robertson v. Smith et al., 28 N. E. Rep. 857.

In the case last cited the court stated that the rule as to the measure of damages was as follows:

"We are of the opinion that the correct rule is to allow attorney's fees and like expenses in so far as it relates to services rendered *in resisting the making of the injunction*, or in procuring its dissolution, although other matters may be involved in the litigation."

Swan v. Timmons, 81 Ind. 243.

We quote from the opinion of the court in the last case cited:

"In dismissing his suit for an injunction, the appellant confessed that he had at that time no legal or equitable right to the relief sought, and the dismissal was a breach of the bond. (7 Ind. 207; 18 Cal. 625; 16 Barb. 325.) Where a party applies for an injunction and is forced to a

dismissal by a plea in abatement, he cannot, in an action upon the bond, have his right to another injunction determined. The dismissal of the action in which the bond was executed is such a breach as vests in the obligee a right of action for expenses incurred *in making the necessary resistance;* and in estimating damages in such a case, it is proper to take into consideration such reasonable attorney's fees as may have been necessarily paid or contracted for in making the proper resistance. (59 Ind. 93; 44 Ind. 392.)"

Miles v. Edwards, 9 Pac. Rep. 814.

The syllabus in the last case cited reads as follows:

"Fees paid to an attorney for securing the dissolution of the injunction, if they are reasonable, are a proper element of damages in an action on the injunction bond."

We quote from the opinion of the court:

"The uncontradicted testimony is that the three hundred dollars paid for attorney's fees was paid for attorney's services in doing whatever pertained to said order, *in preventing the injunction from issuing* and getting rid of the order issued. The respondents were bound to appear at the hearing — to remain until the hearing closed. It was proper that they should be represented throughout by counsel. It was right that they should pay their attorneys. It is just that they should recover from the appellants the amount so paid, if the services were necessary and the price was reasonable. The very terms of the bond are to pay the said defendant any and all damages he may sustain by reason of the said order or the issuing thereof."

Ah Thaie v. Quan, 3 Cal. 219.

We quote from that case:

"It appears to us that the principle is not only just in equity, but sound in law, that *all damages to which the party may be put by the wrongful issuance of the injunction* should be recoverable in actions upon such a bond, and

reasonable counsel fees should be included in those damages."

Certainly the expenses incurred by Mr. Mulvane in resisting the granting of the injunction in the first place, and in procuring its dissolution thereafter, were damages to which he was put by the wrongful issuance of the injunction.

Upon this point also see *Tyler v. Safford*, 31 Kan. 610.

In the case of *Meyers v. Block*, 120 U. S. 213, it was assigned as error that the court below held that the bond, construed with the order requiring it, bound the obligors *for damages sustained before it was given*. The court said:

"The solution of the question raised by this assignment depends upon the fair construction of the order, and of the bond given in pursuance of it, and read (as it should be read) in the light of it. The order was, 'that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction.' The last words clearly mean *all the effects* of the injunction. The condition of the bond was to pay 'all such damages as he (the obligee) may recover against us in case it should be decided that the said writ of injunction was wrongfully issued.' It seems plain to us that *all the damages arising from the wrongful issue of the injunction* were intended to be covered by the bond as well as by the order; in other words, that the bond was intended and understood as a compliance with the requirements of the order. . . . It is unnecessary to review the authorities on this subject. It is undoubtedly true that a surety cannot be held beyond the terms or legal effect of his engagement; and when that has respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively and

not retrospectively. *But if, from the nature of the case, the subject of guaranty is a past transaction* in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to do so."

See also *Andrews v. Woolen Co.*, 50 N. Y. 282.

Cook v. Chapman, (N. J.), 2 Atl. 286.

The condition of the bond in this case was that the obligors should pay the defendants all damages which "they or either of them have already sustained, or may at any time sustain by reason of the granting and issuing of said temporary injunction, if it shall be finally decided that *said restraining order* or said temporary injunction ought not to have been granted."

Now, it would be trifling with the rights of the obligees of this bond to say that attorneys' fees were a proper element of damages under it, that they were entitled to recover *all* damages sustained by reason of the granting of the injunction, and then to say in the same breath that attorney-fees paid in resisting the issuance of the injunction could not be allowed.

THE APPORTIONMENT OF ATTORNEYS' FEES AS BETWEEN THE INJUNCTION PROCEEDING AND THE MERITS OF THE CASE, AND AS BETWEEN MULVANE AND THE OTHER DEFENDANTS.

(Specification 5, paragraphs 1, 2, 3, 4, pages 18 and 19.)

On these points we refer the court to the argument found on pages 54 to 72 of our brief, filed in the State

court, which is attached to this brief. We also call attention to the opinion of the Supreme Court of Kansas upon this point, on page 285 of the record.

VI.

The Question as to whether Suit could be brought upon the Injunction Bond upon the dismissal of the Injunction Branch of the Case; and in this connection whether it was Error to admit the Stipulation dismissing the Injunction Proceedings, are Questions of General Law which will not be reviewed by this Court.

The Questions are not Properly Preserved.

They were all correctly decided by the State Court.

We have already sufficiently discussed the proposition as to whether this court has the power to review upon writ of error to a State court the points involved in this proposition. They are all questions of general law, upon which the decision of the State court is final.

We also desire to have the court bear in mind that there is nothing in the record in any way indicating that a Federal question was connected with these points. No Federal question with respect to them was specially set up or claimed in the court below.

* * *

For our views upon the question as to whether the suit

upon the injunction bond was properly brought upon the dismissal of the injunction branch of the case, without waiting for the issue as to damages to be determined, and, involved in this of necessity, the admissibility in evidence of the stipulation dismissing the injunction proceedings, see our argument on pages 20 to 24 of the brief filed in the State court, and attached hereto. For the opinion of the Supreme Court of Kansas upon the question, see page 283 of record.

For our argument on the contention of counsel that the opinion of the Circuit Court of Appeals was not admissible in evidence, see pages 24 to 39 and 46 to 51 of appended brief.

VII.

The Question as to whether a Surety upon an Injunction Bond given in a Federal Court can escape Liability by the Dismissal of the Injunction Proceedings after a dissolution of the Temporary Injunction, is a Question of General Law with which this Court will not interfere upon Writ of Error directed to a State Court.

The Point was not Properly Preserved.

The Point was correctly decided by the State Court.

We also desire to emphasize the fact, in connection with the foregoing point, that there is nothing in the record to show that a Federal question was involved in it. No

Federal question was specially set up or claimed with respect to it in the State court. Neither is the question one which this court will consider on a writ of error to a State court. It is a question of general law upon which the decision of the State court is final.

For our argument upon the merits of this proposition, see pages 51 to 54 of the annexed brief. For the opinion of the Supreme Court of Kansas upon the subject, see page 285 of the record.

For other authorities see:

Gyger v. Courtney, (Neb.) 81 N. W. 437.

Richardson v. Allen, 74 Ga. 749.

Swan v. Timmons, 81 Ind. 243.

Ascrado v. Orr, 100 Cal. 293 [34 Pac. 777].

Dowling v. Pollack, 18 Cal. 625.

Pugh's Adm'r v. White, 78 Ky. 240.

Hibbard v. McKindley, 28 Ill. 255.

Newsomond Timber Co. v. Roundtree, 29 S. E. 61.

De Berard v. Prial, 54 N. Y. S. 534.

In connection with this matter we call attention to the fact that it was not until after the temporary injunction was dissolved upon a full hearing, that the injunction branch of this case was dismissed.

The court will also bear in mind that Mr. Mulvane was not a party to the stipulation dismissing the injunction

branch of the case. The dismissal was made without any concurrence upon his part.

We furthermore call special attention to the last paragraph of the stipulation, which reads as follows (Record, p. 175):

"5. Nothing in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; *nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.*"

A. L. Williams,

Overmyer, Mulvane & Gault, and

N. H. Loomis,

Attorneys for Defendant in Error.

In the Supreme Court

OF THE

STATE OF KANSAS.

A. J. Tullock, Plaintiff in Error,

vs.

Joab Mulvane, Defendant in Error.

No. 11,318.

STATEMENT OF FACTS.

As the statement of facts contained in the brief of plaintiff in error is not entirely satisfactory, we will make one in accordance with our understanding of the evidence.

This was an action commenced by Joab Mulvane, plaintiff below, against A. J. Tullock and W. M. D. Lee, upon an injunction bond. No service was had upon Lee, and the case proceeded to trial and judgment against Tullock alone. The case was originally tried in the circuit court of Shawnee County and a judgment rendered in favor

of the plaintiff for $4,731.12. The plaintiff not being satisfied with the amount of the judgment appealed the case to this court, where the decision of the lower court was reversed. The opinion of this court in that case is reported in 58 Kansas, page 622.

The case thereafter came on for trial in the district court of Shawnee County, before the court and a jury. A verdict was rendered in favor of the plaintiff for $25,000. A motion for a new trial was filed by the defendant and argued at length. It was overruled by the court and thereupon an appeal was perfected by the defendant to this court.

Upon December 14, 1889, Mr. Mulvane entered into a preliminary agreement with certain parties (Wescott and Hanson) for the sale of the capital stock of The Topeka Water Supply Company for $500,000.

The agreement reads as follows (p. 287 of record):

"BOSTON, December 14, 1889.

"GENTLEMEN: I will sell you the entire capital stock of The Topeka Water Supply Company of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz.: *The sum of sixty*

thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz.: The sum of two hundred thousand dollars ($200,000) to be paid February 10, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20, 1890, and one hundred thousand dollars ($100,000) to be paid March 20, 1890, provided, that final payment of the last named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

"Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

To Geo. P. Wescott, Samuel Hanson.

Joab Mulvane.

"We hereby accept your offer to sell the entire capital stock of The Topeka Water Supply Company for the price and on the terms and conditions above stated.

Geo. P. Wescott,
Samuel Hanson."

The foregoing instrument was executed in the city of Boston late in the evening of Saturday, December 14, 1889. There had been some preliminary negotiations between the parties at Topeka, Kansas, on the 12th of the preceding November. Geo. P. Wescott and Samuel Hanson resided respectively in Portland, Maine, and Boston, Mass., and represented the Maverick Bank

of Boston in the purchase of water works plants and their securities. Joab Mulvane resided at Topeka, and was the chief executive officer and a large shareholder of The Topeka Water Supply Company. The record shows that the parties had met by appointment in the city of Boston on the day the agreement bears date, and that they had a lengthy conference before it was signed. In the course of that interview Mr. Mulvane informed Messrs. Wescott and Hanson that he had not yet succeeded in obtaining control of certain shares of stock of The Topeka Water Supply Company of the par value of $12,000 (see affidavit of Geo. P. Wescott, found on page 33 of "Exhibit A" to record); that the residue of the stock was within his control, but that he only had shares of the par value of $40,000 with him; that he must have $60,000 cash in hand on signing the contract, and that a Mr. Burr, who was president of a Boston bank, would probably be willing to guarantee that the payment of the $60,000 would be a safe thing to do under these circumstances (see affidavit of Geo. P. Wescott, *supra*). With this information the instrument above set out was drawn and signed and the parties separated to meet on the following Monday, December 16, 1889.

When they met on the succeeding Monday, Messrs. Wescott and Hanson submitted a form of contract to be signed by Mr. Mulvane in pursuance of the stipulation in the preliminary agreement above set out, which provided that the $60,000 should be paid to Mulvane on the signing of the same, *but which also contained the provision that the defendant should "at once place in the hands of the cashier of the National Bank of North America in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company."* (This draft of contract may be found on page 28 of "Exhibit A" of record.) Wescott and Hanson further informed Mulvane that the Mr. Burr referred to had refused to give the above mentioned guarantee, although he had given Mulvane a high recommendation for integrity and financial ability (see affidavit of Geo. P. Wescott, *supra*). Wescott and Hanson refused to pay the $60,000 as provided in the agreement made on the preceding Saturday, and insisted that Mulvane should deposit the entire capital stock of the Water Supply Company in the National Bank of North America before the payment would be made.

Mr. Mulvane insisted that, under the terms of

the agreement, he was entitled to the $60,000 without making a deposit of the entire capital stock of the Water Company; that he had with him only $40,000 of the capital stock; that he did not yet control all of it, and that Wescott and Hanson knew those facts at the time the agreement of December 14th was executed. After several hours' conference Mr. Mulvane became convinced that the $60,000 payment would not be made in accordance with the terms of the agreement, and declared the negotiations to be at an end.

Mr. Wescott made the following statements in regard to the breaking off of the negotiations, in his affidavit, found on pages 37, 39 of "Exhibit A:"

"In conversation we told him (Mulvane) that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and did not think that Mr. Mulvane should

ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person; then he (Mulvane) said I understand you will not put up the money unless I put up the stock, and this means more delay. We replied that inasmuch as Mr. Burr would not guarantee his so doing, we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home and his well-recognized financial ability to make good his promises would be accepted here readily, and that we should make the payment of $60,000 without his putting anything against it except his receipt on account; and he thought the recommendation of Mr. Burr had given him was ample and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr. * * * Mr. Mulvane left the room and when he came back about half-past five he said he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room."

The affidavit of Geo. P. Wescott, to which we have referred in support of the foregoing statements, was made on January 28, 1890. Afterwards and on February 16, 1891, Mr. Wescott was examined at length in regard to these negotiations, and we give a few excerpts from his testimony:

He testified on page 127 of "Exhibit A," that

he had not declined to pay Mr. Mulvane the $60,000 unless he put the stock up, and stated that he would have put that amount up if Mulvane had completed the agreement. Then these questions were asked:

"Q. If he had signed the agreement?

A. If he had signed the agreement I would have done it. That is provided for in the Saturday's contract, and if he had demanded his money he would have got it right then and there.

Q. Just on the signing?

A. Just on the signing; *he was entitled to it on the Saturday contract.*

Q. Without a deposit of the stock?

A. Without a deposit of the stock."

(P. 119, "Exhibit A.") "Q. He was to receive $60,000 during that trip, was he not?

A. To be paid at the Bank of North America.

Q. At that time?

A. At that time.

Q. He was not paid that $60,000?

A. For this reason—

Q. I do not ask for the reason; he was not paid that $60,000?

A. He was not.

Q. Now you may state the reason.

A. Because the payment was to be made *to the Bank of North America*, and not to Mr. Mulvane, at the Parker House.

Q. Any payment offered at the Bank of North America?

A. No, sir.

Q. Why?

A. It was to be paid to Mr. Mulvane at that point, *not to the bank.*

Q. Why was it not paid to him at that point?

A. Because Mr. Mulvane refused to complete the agreement he had made on Saturday.

Q. Did he state to you at that time that he did not believe you had any money?

A. He did not." * * *

(P. 120.) "Q. Now, I ask you if you stated in the affidavit that he did?

A. I have not got the affidavit before me. (Affidavit handed to witness.) Yes; it is here that he said he was satisfied we could not raise the money.

Q. You did, then, make that statement in your affidavit?

A. I did; that is correct."

(P. 121.) "A. * * Then I asked him (Mr. Burr) if in his judgment it would be safe for me to pay him $60,000 and let him make delivery of the stock at his pleasure; he thought it would not be a good thing for me to do; he did not think Mr. Mulvane would ask us to do it.

Q. It was, then, on the strength of this, was it not, that you failed to offer Mr. Mulvane the $60,000?

A. No, sir; it was on his failure to sign the contract. If he had carried out the agreement, and if he had signed the contract and supplemental contract of Monday, the money that we required and the payment of the $60,000 would have been arranged all right.

Q. Arranged how? Would you have paid him the $60,000 then?

A. We would have paid it into the bank.

Q. Into the bank. Would you have paid it to him?

A. Not without his putting some stock against it. *We could not unless he put some stock against it.*

Q. But did he not state at the interview on the first day that the stock was at his home, all but $12,000 ($40,000).

A. Yes, sir.

Q. Don't you know you would not have paid him $60,000 unless he put the stock against it?

A. I presume we should not, but the question was not put in that way. If there had been a disposition it could have been arranged undoubtedly.

Q. I ask you now if, but for this interview with Mr. Burr, you would have paid the $60,000 to Mr. Mulvane without his putting up stock against it?

A. *I think not.*"

(P. 122.) "Q. If Mr. Burr had said he would guarantee the carrying out of that contract you would have delivered Mr. Mulvane the $60,000 would you not?

A. Our proposition was to pay it to Mr. Burr; to make the payment to him as middleman, and Mr. Mulvane was to put up stock against it.

Q. That was the proposition that you made to Mr. Mulvane?

A. That was the proposition I made to Mr. Mulvane—that we would put up $60,000 *and he should put stock up against it and draw the money.* * * *

Q. I will put the question in another form and see if I can get an answer. If Mr. Burr had guaranteed the future delivery of the stock within the time mentioned upon the payment of the $60,000 to Mr. Mulvane, you would have paid Mr. Mulvane the $60,000, would you not, on that guarantee?

A. I have no doubt we should.

Q. But you would not after what Mr. Burr had said to you?

A. *No.*"

After the negotiations with Wescott and Han-

son were at an end, Mulvane entered into a contract with Coffin and Stanton and Woodbury and Moulton for the sale of the capital stock of the Water Company for the sum of $550,000. This contract was dated December 18, 1889, and may be found on page 82 of "Exhibit A" of the record. Coffin and Stanton and Woodbury and Moulton paid $50,000 down to Mulvane at the time the contract was executed. The balance was to be paid and the stock was to be delivered upon February 10, 1890. Just five days before the date fixed for the execution of the contract made with Coffin and Stanton and Woodbury and Moulton, Wescott and Hanson brought an action in the United States Circuit Court for the District of Kansas against Joab Mulvane and others, praying for a specific performance of the alleged contract made between them and the said Mulvane on December 14, 1889, and for an injunction to prevent the carrying out of the contract with Coffin and Stanton and Woodbury and Moulton. The defendants joined with Mulvane in the case were The Topeka Water Supply Company, The Topeka Water Company, Coffin and Stanton and the Atlantic Trust Company. Woodbury and Moulton were not made parties.

Upon the filing of the bill of complaint in that case the court issued a restraining order to prevent the execution of the contract made with Coffin and Stanton and Woodbury and Moulton (p. 14, "Exhibit A" to record), and afterwards upon February 13, 1890, issued a temporary injunction of the same tenor and effect which was to be in force upon the giving of an injunction bond in the sum of $75,000 (p. 41, "Exhibit A" to record).

Upon February 15, 1890, the court permitted the complainants, Wescott and Hanson, to deposit $75,000 in lieu of an injunction bond, for the protection of the defendants (p. 42, "Exhibit A" to record), and afterwards, on June 3, 1890, permitted them to give an injunction bond in the sum of $75,000 and allowed the cash deposit to be withdrawn (p. 96 of "Exhibit A" to record). A copy of the bond is attached to the petition in this case and may be found on page 104 of the record.

Upon March 10, 1890, a motion was filed to dissolve the injunction (p. 76 of "Exhibit A" to record), which came on to be heard before Judge Caldwell, at Little Rock, upon April 4, 1890. The former proceedings in the case had been heard before Judge Foster. Judge Caldwell dis-

solved the temporary injunction upon that day (p. 88 of "Exhibit A" to record).

Upon November 28, 1890, a stipulation was entered into between complainants on the one hand and Coffin and Stanton, by Silas B. Jones, their solicitor, and A. L. Williams and J. D. McFarland, solicitors for The Topeka Water Supply Company and The Topeka Water Company on the other hand, whereby so much of the bill of complaint as sought a specific performance of the contract between Mulvane and Wescott and Hanson was dismissed, and the case was to be proceeded with as one for damages upon a breach of contract. All of the defendants except Joab Mulvane were dismissed from the case. The stipulation, which is set out on page 100 of "Exhibit A" to record, reads as follows:

"It is hereby stipulated in the above entitled cause, between the complainants and defendants Coffin and Stanton and The Topeka Water Supply Company and The Topeka Water Company, as follows:

"1. The complainants hereby dismiss their bill as to the above named defendants, Coffin and Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

"2. *Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.*

"3. In consideration of the above, the said defendants, Coffin and Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them, hereby waive, release and relinquish, any and all rights of action they or any of them may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

"4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

"5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; NOR SHALL ANYTHING CONTAINED HEREIN ENLARGE OR LESSEN, OR IN ANY MANNER WHATEVER AFFECT THE RIGHTS OR REMEDIES OF JOAB MULVANE AGAINST COMPLAINANTS IN THIS OR ANY OTHER ACTION.

ROSSINGTON, SMITH & DALLAS,
Sol. for Complainants.

COFFIN & STANTON,
By Silas B. Jones, their Sol.

A. L. WILLIAMS,
J. D. MCFARLAND,
Sol. for The Topeka Water Supply Company and The Topeka Water Company, Defendants."

The case thereafter proceeded to trial, before Judge Riner, and was by him decided against the complainants on September 26, 1892, on the ground that they did not pay to Mr. Mulvane the sum of $60,000 as provided by the terms of the agreement of December 14, 1889 (p. 172 of "Exhibit A" to record). They thereupon appealed the case to the United States Circuit Court of Appeals, where, upon October 16, 1893, the decree of the lower court was affirmed. The decision of the Court of Appeals may be found on page 286 of the record. The substance of the decision was that Wescott and Hanson had not complied with the terms of the contract made with Mulvane; therefore that they were not entitled to a specific performance of it or to damages as for a breach of contract. The court also held that by withdrawing so much of the bill as prayed for a specific performance of the contract the complainants withdrew their prayer for an injunction, which was merely an incident to the prayer for specific performance, and that no question could thereafter be raised as to the propriety of the ruling of the lower court in dissolving the temporary injunction.

After all questions as to the correctness of the ruling dissolving the temporary injunction had

been set at rest by the stipulation waiving specific performance as just stated, and on November 5, 1892, the action at bar was brought by Joab Mulvane against A. J. Tullock and W. M. D. Lee, the parties who signed the injunction bond above referred to.

Mulvane was compelled to pay large sums of money in his endeavor to prevent the allowance of a temporary injunction and in afterwards procuring its dissolution. The details of these expenditures, and the items of damages claimed, are set forth in plaintiff's amended petition which may be found on page 257 of the record. These items may be summarized as follows:

1. Interest on the sum of $500,000 at 6 per cent per annum, from time injunction was granted until it was dissolved, this being the amount of money Mulvane was prevented from collecting by reason of the injunction	$ 4,500.00
2. Attorneys' fees in connection with the injunction part of the case	16,000.00
3. Various traveling expenses, telegrams, stenographer's fees, court costs, etc., caused by the injunction,	869.48
Total	$21,369.48

Interest at 6 per cent upon expenditures actually made, from time made until date of verdict, would

amount to more than $8,000, making the aggregate amount of plaintiff's claim, with interest, about $30,000.

Argument.

I.

The Allowance of Attorneys' Fees as Damages on Injunction Bonds Given in Federal Courts is Permissible Under the Laws of this State.

This proposition was exhaustively argued and decided in the affirmative when the case was here before. Further argument upon it seems unnecessary.

Counsel cite authorities to the effect that a federal court has the power either to assess the damages upon an injunction bond in the main suit, or to permit an action at law to be maintained for the purpose of ascertaining the damages. Conceding this to be the law, it in no wise affects the proposition that the measure of damages is to be determined by the law of the forum. That proposition is based upon the theory that the court has required the execution of a bond which *may* be enforced in a State court. If it is an instrument which may be sued on in a State tribunal, the law of that tri-

bunal necessarily governs as to the measure of damages.

No effort was made to have the damages assessed in the main action, nothing was done to restrain the prosecution of this case in the State court, nor was a petition for the removal of the case to the federal court filed. The jurisdiction of the State court to render judgment for damages upon the injunction bond has never been questioned. It had the unquestioned power to render judgment upon the bond and to determine the proper measure of damages.

II.

The Sufficiency of the Petition to Justify the Allowance of Attorneys' Fees, and the Amendment of the Petition.

It is urged that attorneys' fees were not recoverable as they were in the nature of special damages and were not specially declared on in the petition. The petition alleged that plaintiff had suffered damages caused by the issuance of the injunction, in the sum of $75,000, for which sum of money he prayed judgment. It was never attacked by motion, and under it plaintiff intro-

duced his testimony upon the first trial, in regard to the amounts paid by him for attorneys' fees and other expenses. The defendants were fully advised upon the second trial, therefore, as to the exact nature of the measure of damages claimed by plaintiff.

However, to save any question upon this part of the case, and in view of the fact that defendant had asked leave to amend his answer, plaintiff, immediately upon the filing of defendant's amendment, obtained leave and filed an amended petition, setting out in detail the damages claimed by him. This amendment may be found upon page 257 of the record. The court had the power to permit it to be made and there was no abuse of discretion in authorizing it to be done. Neither was there any abuse of discretion in refusing defendant a continuance upon the filing of the amendment. The continuance was requested as a matter of absolute right, without any showing, or anything to indicate that a postponement was necessary, other than the mere fact that the amendment had been made.

III.

This Action Was Not Prematurely Brought.

The temporary injunction was dissolved upon April 4, 1890. Upon October 7, 1890, complainants filed a stipulation withdrawing so much of their bill as sought a specific performance of the alleged contract between complainants and Joab Mulvane. Inasmuch as the injunction was only an incident to the relief of specific performance, the withdrawal of so much of the bill as sought a specific performance of the contract was a dismissal of the injunction proceedings, and the case thereafter proceeded solely as a suit for damages.

The court will observe in considering this matter that Joab Mulvane was not a party to this proceeding. He had nothing to do with it. The court will also bear in mind that the equitable relief desired could not be obtained without the presence of Woodbury and Moulton, who were held to be necessary parties. With Woodbury and Moulton in the case the court lost jurisdiction of it. So in order to keep the case in court at all it was necessary to dismiss the equitable part of

it and proceed with it as a suit for damages exclusively against Joab Mulvane.

Now, when the complainants voluntarily dismissed the case, as far as the injunction part of it was concerned, they could no longer litigate any question connected with the granting or dissolution of the injunction. The jurisdiction of the court was gone—that part of the case was finally ended.

In the case of *Mitchell vs. Sullivan*, 30 Kan. 231, it was held as follows:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary order of injunction, and after the judgment an action lies upon the injunction undertaking."

See, also:

Bell vs. Matthews, 37 Kan. 686.

Marbourg vs. Smith, 11 Kan. 562.

Kelley vs. Sage, 12 Kan. 109.

For decisions of other courts upon this subject, see:

Pugh's Adm'r vs. White, 78 Ky. 210.

Richardson vs. Allen, 74 Allen, 719.

Hibbard vs. McKindley, 28 Ill. 255.

DeBevard vs. Prial, 54 N. Y. S., 534.

Neusemond Timber Co. vs. Roundtree, 29 S. E. 61.

Dowling vs. Pollack, 18 Cal. 627.

The suit could proceed as one for damages without involving in any way the question as to whether plaintiffs were entitled to equitable relief. If plaintiff had recovered a judgment for damages, that would not have been equivalent to a finding that he was originally entitled to the issuance of a temporary injunction. In fact, one of the defenses urged against the granting of the injunction was the proposition that a suit for damages would have afforded plaintiffs a complete and ample remedy for the alleged wrongs of which they complained. After the injunction branch of the case had been dismissed the court no longer had any authority over it, and any proceedings of the court thereafter had, with respect to that phase of the litigation, would have been without jurisdiction and void. Such proceedings could be collaterally attacked, and would have no more force than a personal judgment rendered without service of summons upon the defendant.

But we are not compelled to rely upon the foregoing authorities to establish our contention that the dismissal of that part of the case calling for equitable relief amounted to a final determination of the question as to whether the injunction had been properly granted. It has been determined adverse to the claims of plaintiffs in error by the United States Circuit Court of Appeals in the case in which the injunction was granted and is *res judicata*. In regard to this matter the court uses the following language (see page 294 of record, and 58 Fed. Rep. page 308):

"It is assigned for error that the Circuit Court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think it all sufficient to say, that the appellants can not be heard to complain in this court of the order dissolving the temporary injunction, after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn the injunction necessarily shared the same fate."

Counsel cite a number of authorities to show that questions connected with the granting and dissolving of injunctions are not finally determined

so long as an appeal is pending. We have no desire to take issue with these authorities. Our answer to them is that they do not apply to this case. If, after Judge Caldwell had dissolved the temporary injunction, the cause had proceeded in the usual course and an appeal had been taken to the Circuit Court of Appeals, then the point decided by these cases could have been properly raised.

But in this case plaintiffs voluntarily abandoned their injunction proceedings and the appeal thereafter taken by them related entirely to the branch of the case which had *not* been dismissed, and had nothing to do with the injunction proceedings.

IV.

There was no Error in Receiving Evidence of the Decision of the United States Circuit Court of Appeals.

But counsel say that the court erred in receiving in evidence the opinion of the Circuit Court of Appeals. This subject is treated of under their sixth assignment of error.

Their argument may be generalized as follows:

(*a*) It was improper to receive evidence as to

the decision of the Circuit Court of Appeals under any circumstances.

(*b*) It was particularly improper to receive such decision in evidence inasmuch as it was rendered after the commencement of this suit.

(*c*) The decision of the Circuit Court of Appeals was not properly provable by its opinion. We will treat of these points in their order.

(*a*) *It was proper to prove the decision of the Circuit Court of Appeals.*

In considering this question, we desire, first, to eliminate the objections which arise on account of the decision having been made subsequent to the commencement of the suit at bar, as well as the further objection that the opinion of the court is not proper evidence of what its decision was, so that we may determine at the outset whether the decision of the Court of Appeals was admissible in evidence under any circumstances.

For the purpose of obtaining a proper grasp of the point involved let us suppose that prior to the bringing of this suit the Circuit Court of Appeals had decided, 1, that all questions connected with the injunction part of the case had been finally disposed of on account of plaintiffs' voluntary withdrawal of so much of their cause as called for

equitable relief, and had therefore refused to consider them; 2, that the trial court had erred in refusing to admit testimony upon some question connected with the proper construction of the contract and had thereupon reversed the case and remanded it for further hearing upon the question of damages as in an ordinary law case.

Suppose that Joab Mulvane had then brought suit upon his bond, after the decision of the appellate court had become effective, and before a new trial upon the question of damages had been had in the federal court.

Under the foregoing circumstances can it be claimed that the decision of the Court of Appeals was not competent or relevant testimony in the suit upon the injunction bond, for the purpose of showing that all questions as to the propriety of issuing or dissolving the injunction had been finally determined?

There can be but one answer to this question.

In proving his case, under such a state of facts, plaintiff would have a right to show all the circumstances connected with the granting of the injunction, its dissolution, the dismissal of the injunction proceeding, and the decision of the Circuit Court of Appeals to the effect that the in-

junction branch of the case ended with its dismissal in the trial court. This would be the proof which a lawyer would ordinarily make under such circumstances. It might be objected to such evidence that as the record already showed the dismissal of the injunction proceedings by the plaintiffs, the court would declare as a matter of law that its effect was to finally determine all questions connected with the injunction part of the case, and that testimony to the effect that it had been judicially determined between the same parties that such was the effect of the dismissal would be unnecessary and immaterial. But such an objection would not be tenable. If there are two consistent theories upon which plaintiff may rely in support of his claim, there is no reason why he may not introduce testimony in support of both of them. If A should seek to put in judgment in Kansas a decree obtained against B in New York, B would have the right to show not only that the decree was void as a matter of law, because of a want of jurisdiction over him, but that the Court of Appeals of New York had subsequently so decided in the original suit.

A defendant in ejectment may prove, in support of his right of possession, not only instruments

purporting to convey the fee simple title to him, but also evidence showing adverse possession for more than fifteen years. These defenses are not inconsistent, and he would not be required to elect between them.

A defendant sued upon a written obligation would have the right to show that it was void upon its face as a matter of law, and in addition thereto that the question had already been decided in his favor by another tribunal, in a case where the parties and the issues were the same. He would not be compelled to elect between these two defenses but might rely upon both of them.

So in this case, plaintiff had the right to rely not only upon the legal proposition that the injunction part of the case was finally ended upon its dismissal, but upon the fact that the question was *res judicata*.

We now come to the inquiry as to whether or not the fact that the decision of the Circuit Court of Appeals was made subsequent to the beginning of this action affects the question of its admissibility as evidence.

(*b*) *The fact that the decision of the Court of*

Appeals was made after the beginning of this suit does not affect its admissibility.

The United States Circuit Court of Appeals did not decide that the Circuit Court was right in dissolving the injunction The appellate court held that it could not entertain or consider any questions connected with the propriety of allowing or dissolving the injunction, as these matters had been eliminated from the case by plaintiffs' voluntary action. It held that all matters pertaining to the injunction feature of the case had been finally disposed of by the dismissal of that part of the bill which prayed for equitable relief. The case of Mulvane against Tullock was not begun until long after the dismissal had become effective.

The decision of the Court of Appeals was admissible for the purpose of showing its adjudication as to the status of the case prior to the time this suit was brought. The decision did not confer any substantive rights upon Mulvane. It was merely declarative of the rights possessed by him when Wescott and Hanson dismissed their injunction proceedings. To illustrate: If, during the pendency of an ejectment suit, the defendant A purchases an outstanding title, he thereby becomes possessed of a new and substantive right, pending

the litigation. But if, while the case is pending, a final decision is made by another court, in an action between the same parties and involving the same issues, to the effect that A is, and at all times in question had been, the owner, and entitled to the possession of the land in controversy, there would be a case in which no new right was obtained by A as the result of the decision of the court, but merely a judicial declaration as to what his rights were at the beginning of the action. And it is plain to be seen that such decision could be used as evidence in support of A's defense even though it was rendered during the pendency of the case.

Decisions made in one case involving issues in other pending cases, so far as the point under discussion is concerned, are somewhat analogous to admissions made by a party during the pendency of litigation. If, while an action is pending between A and B as to the title to a piece of land, A admits that certain deeds upon which he relies are forgeries, there is no reason why these admissions are not admissible in evidence even though made long after the suit was commenced.

Let us examine some of the authorities bearing upon the point under consideration.

In the case of *Duden vs. Maloy*, 43 Fed. 407, it appears that in a suit in equity, pending in the federal court in New York, a question arose as to whether a certain factory business was or was not a partnership enterprise, and whether or not the lands, buildings and appurtenances thereof formed a part of the assets of a certain partnership. Testimony was taken before the master, who reported that the business was *not* a partnership enterprise, and that the property did not belong to the partnership. The court in which the master's report was filed stated that the master's finding seemed to be in accord with the weight of testimony which ordinarily would be sustained. Upon the hearing, however, of the exceptions to the master's report, the defendant presented a judgment of the supreme court of the State of New York, rendered *subsequent* to the filing of the master's report, in an action wherein the parties were the same. In that case the same issues were raised as those which were passed upon by the master. In the State court it was adjudged that the property *was* partnership property, which was in direct conflict with the finding of the master in the equity case. The federal court thereupon held that, notwithstanding the master's report to the

contrary, the decision of the State court was *res judicata* and must be followed by the court in which the master's report was filed.

The case of *Hatfield vs. Hatfield* is an instructive one upon this point. A synopsis of it can be found in 20 Howard's State Trials, 395. The following quotation is taken, however, from Van Fleet on Former Adjudication, page 5:

"A widow brought suit to recover a provision made for her by the will of her late husband, and the defense was that she was not his widow because she had formerly been married to one Porter, who was her lawful husband, and as such had released the provision. *While this suit was pending* she brought a suit of jactitation against Porter, who in collusion with her employed counsel to represent him, who let the matter go without counter proofs, and a sentence was rendered declaring her free from all contract with him, which was decided by the House of Lords to bar the defense."

In the case of *Bryar et al. vs. Bryar*, 78 Fed. 657, "the wife of a bankrupt brought a bill in equity in the United States District Court against the bankrupt and his assignee, claiming to be the equitable owner of the undivided one-half of land the legal title to which was in the bankrupt; C, the purchaser of the land at assignee's sale, intervened as defendant. There was a decree in favor of the wife, and an appeal therefrom to the United

States Circuit Court. *Pending this appeal* the wife brought ejectment in a court of the State (Pennsylvania) against C, upon the same equitable title which was the foundation of her pending bill. The ejectment was tried upon the merits, and resulted in a verdict and judgment against the wife. *Held*, that she and her heirs were thereby concluded in the pending suit in the Circuit Court."

In the case of *N. Y. N. H. & H. R. Co. vs. Cockroft et al.*, 49 Fed. 3 (Conn.), it appears that railroad companies before condemning additional lands for railroad purposes must get the consent of the railroad commissioners. An appeal lies from their decision and the appeal operates as a *supersedeas* of the order complained of. After the consent to condemn is obtained the amount of damages to be paid is ascertained on proceedings instituted before the judge of the superior court.

In the case cited the landowner appealed from the decision permitting the condemnation. Pending the appeal, the railroad company made application for the ascertainment of the damages. The defendants (landowners) removed the application to the federal court, and pleaded the appeal in abatement. When the plea was filed the appeal had not been determined. *It was afterwards held*,

by the highest court, that the appeal could not be entertained for want of jurisdiction. The court sustained a demurrer to the plea and overruled the contention of the defendant to the effect that the plea was to be considered as of the time it was filed, without regard to the subsequent decision of the superior court. In the course of the opinion the court say:

"The counsel for the defendants further insists that the fact of the appeal operated by force of the statute as a *supersedeas* of all further proceedings until final action of the court thereon; and that this proceeding for the ascertainment of the damages could not be had before then. The nature of the proceeding for an appeal is important here. No appeal is taken before, filed with, or allowed by, the railroad commissioners, and no removal of the proceedings before them or of their record is had. The application to the superior court is an independent proceeding, which operates upon the parties, and not upon the railroad commissioners nor their judgment, until the superior court acts. That court has not acted upon the appeal at all; but has merely held that there was none. If it had taken jurisdiction an appeal would have been pending; and, if sustained, its order, and not that of the railroad commissioners, would have been the foundation for further proceedings, if any were provided for. *But, as it took no jurisdiction whatever, the proceedings of the railroad commissioners were left in force as they had been all the while.* The statute does not provide that an attempted appeal, nor that the service of a citation on a petition for an appeal, shall operate as a *su-*

persedeas, but that such appeal—that is, an appeal in such a case—shall operate as a *supersedeas*. This is settled to be not such a case; therefore this was not such an appeal as the statute gave that effect to. Demurrer sustained, and plea adjudged insufficient."

In the case of *Wager vs. Providence Ins. Co.*, 150 U. S. 99, the insurance company brought an action against Henry Morse & Co. and Chas. E. Wager, whereby it sought to become subrogated to certain claims which other parties held against Morse & Co. and Wager as carriers. A decree was rendered against the respondents for a certain amount to be paid jointly and severally, and for a certain amount payable by Wager alone. An appeal was prosecuted by Wager to the United States Supreme Court. The Supreme Court decided that Wager's defense had been settled adversely to him by another case and that the decision in that case was *res judicata*. It appears that Wager had prosecuted an appeal in the other case (*The Sydney*) which appeal was pending *at the time Wager's answer was filed in the main case*. The Supreme Court took judicial notice of the fact, however, that it had dismissed the other case for want of jurisdiction. The language of the court is as follows:

"It can not be questioned that, in the present case, the Circuit Court could, and this court on appeal can, take notice of the former case in the southern district, because the proceedings and decree therein are set up at length in the answer of Wager in the present case. It is true that Wager alleges, in his answer, that he had prosecuted an appeal to the Supreme Court, *which was then pending*. But the record of that appeal shows that it was dismissed by this court for want of jurisdiction. (*The Sydney*, 139 U. S. 331.) We think, therefore, that the Circuit Court did not err in regarding Wager as having been concluded by the trial and decree in the former case, and in entering a final decree against him."

The dates in the case just referred to are as follows: The main case, *Insurance Co. vs. Morse and Wager*, was commenced in May, 1887, and was finally decided by the Supreme Court November 6, 1893. The decision of the Supreme Court in the case of *The Sydney* was made March 30, 1891. Thus in a case brought in May, 1887, the United States Supreme Court took judicial notice of a decision of their own court made nearly four years after the bringing of the suit, for the purpose of applying the doctrine of *res judicata*.

The case of *David Bradley Mfg. Co. vs. Eagle Mfg. Co.*, 57 Fed. 980, was an action for an injunction to restrain infringement of a patent. The complainant offered in evidence the decree of

another court, to which defendant objected upon the ground that such decree was interlocutory only at the time of the bringing of the main suit, and therefore was not *res judicata*. The court said:

"That the decree was interlocutory at the bringing of this suit, and subsequently ripened into a final decree, does not impair its efficiency or conclusiveness when properly presented in this suit. The relative time of institution of suit, or the relative date of final decree, is not of consequence if the merits of the controversy be thereby fully and finally determined, and the record thereof is properly brought to the attention of the court. (*Duffy vs. Lytle*, 5 Watts, 120; *Casebeer vs. Mowry*, 55 Pa. St. 422; *Child vs. Powder Works*, 45 N. H. 547.)"

In *Duffy vs. Lytle*, 5 Watts, 120, it was held as follows:

"A prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment is in an action commenced subsequently to the one in which it was pleaded."

In *Casebeer vs. Mowry*, 55 Pa. St. 419, the court decided that—

"A verdict was given for the plaintiff in an action for flooding his land; there was a motion for a new trial, pending which another action was brought for the same nuisance. Before the trial a new trial was refused and judgment entered in the first suit. The court charged that this was

not conclusive on the defendant, because it did not exist when the suit was brought. *Held*, to be error.

"The date is of no consequence; it is the fact of an adjudication on the same subject-matter between the same parties which gives effect to the former recovery."

Lewis P. Childs vs. Eureka Powder Works, 45 N. H. 547.

In the case of *Simpson et al. vs. Voss*, 31 Kan. 227, suit was brought for the wrongful seizure and conversion of personal property. The defendant, a United States marshal, attempted to justify under an order of attachment directed to him. Subsequent to the filing of the reply in the case the court granting the order of attachment, upon motion, discharged the attachment proceedings. Thereafter the plaintiff, with leave of the court, filed an amended or supplemental reply, setting up the dissolution of the attachment. *Held*, that the court committed no error in allowing the reply to be filed, as it alleged facts material to the case occurring after the former reply. The court say:

"The discharge of the attachment related back to the issuance of the order of attachment, and swept away the defense that by virtue of the attachment proceedings the defendants below officially took possession of the property claimed.

After the attachment was dissolved, they could not justify thereunder."

Hentig vs. Redden, 46 Kan. 231.

Peterson vs. Albach, 51 Kan. 150.

McPheeters vs. Birk, 48 Kan. 784, 787.

We quote from the opinion of the court in that case:

"It is insisted by the defendant in error that any fact, to be pleaded in estoppel, must have existed at the time the plaintiff commenced his action; that nothing that arose subsequently could be pleaded in estoppel of the right of the defendant to defend against such action. This position is untenable under our Code of Procedure, which expressly authorizes supplemental pleadings to be filed, alleging facts material to the case occurring after the filing of the former petition, answer or reply. (Civil Code, Sec. 144.)"

Not Necessary to Specially Plead the Decision.

The supplemental pleadings provided for in our Code are in the nature of the old plea of *puis darrein continuance*, which provides for the setting up of matters in bar or abatement which had happened since the last continuance of the case.

In the case at bar it was not necessary for plaintiff to specially set up the decision of the Circuit Court of Appeals, because the decision was mere matter of evidence. Plaintiff pleaded in his

petition that there had been a final adjudication of the questions relating to the injunction, and in support of that allegation he offered *as evidence* the decision of the United States Circuit Court of Appeals. That decision did not hold that the injunction was improperly allowed or properly dissolved, but determined the effect of complainants' action in dismissing the injunction part of the case. Plaintiff introduced in evidence the stipulation filed by Wescott and Hanson dismissing the injunction proceedings; as additional evidence he offered the decision of the Court of Appeals, the effect of which was that the injunction proceedings in the case were finally ended upon the dismissal made by Wescott and Hanson, and that the Court of Appeals could not thereafter entertain an appeal growing out of those injunction proceedings, and could not determine whether the injunction was properly dissolved or not.

In the case of *Krekeler vs. Ritter*, 62 N. Y. 372, defendant's counsel offered in evidence upon the trial the judgment of another court. Plaintiff objected on the ground that it had not been set up in the answer or by supplemental answer. The objection was overruled. The Court of Appeals of New York held as follows:

"The record of the superior court was not offered or received in evidence in bar of the action, but merely as evidence of the fact in issue. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. * * * But as evidence of a fact in issue it was competent although not pleaded, like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties. (*Wright vs. Butler*, 6 Wend. 284; *Lawrence vs. Hunt*, 10 Id. 81; *Embury vs. Connor*, 3 Comst. 511; *Gardner vs. Buckbee*, 3 Cow. 120.) The court properly held that the matter adjudicated between the parties in another action might be given in evidence."

In the case of *Gardner vs. Buckbee*, 3 Cow. 120, it was held that—

"The judgment of a court of concurrent jurisdiction, directly upon a point, is conclusive between the same parties, upon the same matter coming directly in question in another suit.

"And this, whether it be pleaded, or given in evidence under the general issue.

"It is conclusive, whether it appears, upon the face of the record in the former suit, that the same matter was tried and passed upon, or not.

"If it was, in fact, so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried upon the pleadings in the record."

In the case of *Insurance Co. vs. Harris*, 97 U. S. 331, 336, the lower court had refused to receive in evidence, as *res judicata*, a judgment of another court. With reference to this matter the Supreme Court of the United States said:

"If, then, the record of the decrees of the New York court was pertinent to the issue in the case in the Circuit Court, as we have seen it was, and was material, why should it not have been received? There was nothing in the pleadings, nor in the agreement of the parties, we think, that stood in the way of its admission. *The defendant below, now plaintiff in error, had pleaded the general issue, and under that, in assumpsit, a judgment recovered may be given in evidence.* (2 Stra. 733; 1 Saund., Williams' notes, 67 *a*; *Stafford vs. Clark*, 2 Bing. 377; *Young vs. Black*, 7 Cranch. 565.)"

Vol. 21 Am. & Eng. Enc. of Law, p. 258.

(*c*) *The opinion of the United States Circuit Court of Appeals was admissible in evidence to show what the decision of the court actually was.*

The mandate of the United States Circuit Court of Appeals merely shows that the decree of the lower court was affirmed. There was no possible way of determining its decision as to the finality of the injunction proceedings, except by reference to its opinion.

It is well settled law that the judge's public

rulings can be offered in evidence to determine what issues were passed upon.

Van Fleet on Former Adjudication, page 843.

To put it in another way, parol evidence is admissible for the purpose of showing the exact point passed upon by the court.

Black on Judgments, vol. 2, sections 623, 624, states the law upon this subject and cites many authorities:

"Sec. 623. It has been held in a few cases (principally very early decisions) that the record of a judgment in a former suit between the same parties, to constitute an estoppel, must show that the same subject-matter had been passed upon and adjudicated in that suit. In other words, that an estoppel can not be created by parol evidence helping out a record; but to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone. But this doctrine, so far as concerns the kind of evidence admissible to identify the points adjudicated, is now generally repudiated.

"Sec. 624. It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial. That is, 'it is not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover or

the validity of the defense depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury.' The ancient rule must therefore be regarded as modified by the later decisions so as to assume the following form: The record must show that the same matter *might* have come in question on the former trial, and then the fact that it *did* come in question may be shown by extrinsic proof. For example: where, in an action of ejectment, the defendant, to defeat the action, introduced and read in evidence the record of a judgment in a former action of ejectment between the same parties for the same premises, by which it appeared that a verdict was rendered for the defendant and a judgment entered thereon, it was held that the plaintiff might prove by a person present what title the defendant set up and established on the former trial, and on what questions the suit was litigated and decided, those facts not appearing by the record.

"Further, if the record is silent or ambiguous, as to the points at issue and the grounds of the decision, parol evidence is not only *competent* to identify the questions adjudged, but it may become *necessary* in order to insure the effect of the judgment as an estoppel. 'If it appear that several distinct matters may have been litigated upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' A good illustration of this rule is found in the case of *McDowell vs. Langdon*, where it was held that a

verdict and judgment for the defendants, in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty, and a specification of defense denying both the plaintiff's right and any injury thereof, were no bar to a suit in equity to restrain such obstruction, where, upon the record of the former action, it was doubtful (and was not shown by extrinsic evidence), whether the defendants in that case prevailed on the ground that they had the right which they claimed in their specification of defense, or on the ground that they had done no acts in violation of the plaintiff's rights."

See, also:

Campbell vs. Rankin, 99 U. S. 261, 263.

Cromwell vs. Sack, 94 U. S. 352.

Miles vs. Caldwell, 2 Wallace, 35.

Packet Co. vs. Sickles, 5 Wallace, 580.

Davis vs. Brown, 94 U. S. 423.

Russell vs. Place, 94 U. S. 606.

Perkins vs. Parker, 10 Allen, 22.

Monroe vs. Meech, 94 Mich. 596; 54 N.W. 290.

Estele vs. Taul, 2 Yerg. 466.

Sanderson vs. Peabody, 58 N. H. 116, 118.

Gilbert vs. Earle, 47 Vt. 9.

Carmany vs. Hoober, 5 Pa. St. 305.

Smith vs. Auld, 31 Kan. 266.

Scott vs. Wagner, 2 Kan. App. 386.

Even Though Improperly Admitted in Evidence, the Opinion of the Circuit Court of Appeals Could Not Have Operated to the Prejudice of the Defendant.

The opinion in question was brief and contained nothing that could have prejudiced Mr. Tullock in the trial of this case. It recited the undisputed facts in the case—facts shown by the testimony of Wescott and Hanson, and declared that under them complainants were entitled to no damages. The court then proceeded to hold that it could not pass upon any of the questions involved in the granting and dissolution of the injunction, as that part of the case had been voluntarily dismissed by the complainants.

Judge Riner decided that complainants were entitled to no damages upon the merits of the case, and that fact was shown by the printed record about which there is no controversy. Judge Riner's opinion was very similar to that of the Court of Appeals. The appellate court simply affirmed his decision and recited the substance of complainant's own testimony in support of its conclusion. Its determination in regard to the finality

of the injunction proceedings differs in no wise from the instructions given by Judge Hazen.

Practically the only question which the jury had to pass upon in this case was the measure of damages, and we can not perceive how the opinion of the Circuit Court of Appeals could have had an effect upon the jury prejudicial to the rights of the defendant, in determining the amount of damages plaintiff was entitled to recover.

Statements are made in the brief of plaintiff in error as to the unfair and improper arguments to the jury made by counsel for plaintiff below, based upon this opinion. The only foundation for such statements is the following paragraph found on page 318 of the record. It reads as follows:

"In the closing argument before the jury, Mr. A. L. Williams, one of plaintiff's attorneys, referred to, explained and discussed the opinion of the United States Circuit Court of Appeals, rendered in the case of *Wescott and Hanson vs. Mulvane*, which had been admitted in evidence, and contended that said suit had been maliciously brought, and without probable cause therefor."

From the foregoing it is impossible to determine the nature of the remarks made by counsel in regard to this opinion. If prejudicial they should have been placed in the record or the substance of them given. No exceptions were taken to the

arguments and no affidavits filed giving any portion of the alleged unfair statements made by the attorneys for plaintiff to the jury.

The record does not state that it was argued to the jury that the opinion of the Circuit Court of Appeals showed that the cause of Wescott and Hanson against Mulvane was maliciously brought and without probable cause. The record states that such argument was made, but it negatives the idea that it was based upon the opinion of the Court of Appeals. As a matter of fact, this argument was founded solely upon the theory of defense advanced by adverse counsel during the trial of the case as shown by the questions propounded by them to the witnesses and their argument to the jury.

Their questions assumed that the services rendered by Mulvane's attorneys were not valuable, because the point upon which the injunction was dissolved was so simple that all lawyers ought to understand it. That it took no skill to convince a court that when a necessary party defendant was a citizen of the same State as one of the plaintiffs, that the federal court had no jurisdiction of the cause. We will quote one or two of their questions to witnesses upon this point:

McFARLAND, 250. "Q. The only question involved was as to the necessary parties, and if the court should have found that fact to exist, then you know and everybody else knows and as [all] lawyers know, that the federal court has not jurisdiction between citizens of the same State."

MULVANE, 159. "Q. All you had to do, as it turned out, was to go into court and suggest that there was an undisclosed principal by the name of Woodbury and Moulton who participated in this contract that you made with Coffin and Stanton, and as soon as the court's attention was called to that fact, by reason of Woodbury and Moulton being citizens of the same State with one of the plaintiffs, that is, of the same State with Mr. Wescott, of course the federal court understood it did not have jurisdiction and dissolved the injunction? That was all there was to it, wasn't there?"

A. A. HURD, 196. "Q. You knew as counsel for the defendant that Woodbury and Moulton were joint parties with Coffin and Stanton to this contract, and you knew Mr. Woodbury was a citizen of the State of Maine, being a citizen of the same State as one of the complainants in this case. You knew that fact?

A. Yes, sir.

(197) Q. Well, knowing that fact then, didn't you know that upon that fact being brought to the attention of the federal court that that court would say: 'This court is without jurisdiction,' and as a matter of course dissolve the injunction?"

Now the record shows that on February 24, 1890 (P. 43, "Exhibit A.") Woodbury and Moulton filed a motion supported by affidavits, contending

that they were necessary and indispensable parties defendant in the cause and praying the court to permit them to be made defendants. This request was resisted by Wescott and Hanson and the motion of Woodbury and Moulton overruled. That the matter was discussed at the time the application for temporary injunction was being heard is shown by the remarks made by Judge Foster found on page 75 of "Exhibit A." Motions were afterwards made to dissolve the injunction, and one of the grounds given for the dissolution was that Woodbury and Moulton, who were indispensable parties defendant, were citizens of the same State as one of the complainants, and therefore the court had no jurisdiction of the case. In short, counsel for Wescott and Hanson, who thoroughly understood the position of the defendants growing out of the citizenship of Woodbury and Moulton, opposed the dissolution of the temporary injunction and kept Mulvane tied up just as long as it was possible to do so. They knew he was straining every nerve to untangle himself so that he might carry out his contract with Coffin and Stanton and Woodbury and Moulton; they knew that bankruptcy threatened him and that it was the result of the injunction which tied up a

transaction involving half a million dollars; yet they insisted upon the allowance of the temporary injunction, resisted its dissolution, and held on to their advantage as long as they could. The injunction was in force from February 5 until April 4.

Now, if *any* lawyer would have known that the court was without jurisdiction of the case, and had no legal power or authority to grant an injunction, it goes without saying that lawyers of the eminence and ability of those who represented Wescott and Hanson *must* have known it. And if they knew it, was it not the quintessence of malice to keep Mr. Mulvane tied up by an injunction illegally granted and kept in force without authority of law?

This was the basis for the argument that the prosecution of the injunction suit against Mulvane was malicious, and not the opinion of the Court of Appeals.

V.

The Happening of the Condition upon which Liability Under the Bond Depended.

The condition upon which the liability on the injunction bond depended took effect when the injunction proceedings were dismissed. Under their

fourth specification of error counsel for plaintiff in error argues that the condition of the bond was that Tullock should become liable when it was *finally decided* that the injunction was improperly granted; that as the injunction proceedings were dismissed it left no opportunity for the court to finally determine the propriety of granting the injunction in the first place, and therefore that the condition in the bond upon which liability depended never happened. A number of authorities are cited in support of this contention.

Whatever the law may be in other jurisdictions, it is settled in the State of Kansas, as well as in other States, that when a surety goes upon an injunction bond conditioned for the payment of all damages which the defendant may sustain if it be *finally determined* that the injunction was improperly granted, he is liable for the damages sustained by the defendant if the injunction proceedings are dismissed. In other words, the dismissal of the injunction proceedings is equivalent to a final determination by the court that the temporary injunction was improvidently granted. We have already quoted the syllabus in the case of *Mitchell vs. Sullivan*, 30 Kan. 231, but it is so

directly applicable to this point that we will quote it again. It reads as follows:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary injunction, and after the judgment an action lies upon the injunction undertaking."

It is unnecessary to refer to similar authorities from other States bearing upon this point, inasmuch as we have given them in another part of this brief, in support of the proposition that the action was not prematurely brought.

When Tullock signed the injunction bond he knew that the temporary injunction had been dissolved; that the court had decided that it was without jurisdiction of the cause, and that he was responsible for all damages which the defendants had, or might sustain, by reason of the granting of the injunction. He also knew that it was within the power of the complainant to dismiss the injunction proceedings and that this was equivalent

to the final determination of the cause referred to in the bond signed by him.

If the contention of counsel were correct, then no damages could ever be recovered upon an injunction bond after a temporary injunction had been issued and afterwards dissolved, provided the plaintiff dismissed his case before its final termination. In that way parties could tie up the business affairs of others for an indefinite period, find out the probable result of the injunction proceedings, and if unfavorable, escape all liability upon the injunction bond by dismissing the case. A bare statement of the proposition is sufficient to show its absurdity.

VI.

Apportionment of Attorneys' Fees.

Under the 5th assignment of error it is urged that there was a total failure to apportion the attorneys' fees, and that Mulvane therefore could not recover any such fees.

It is claimed that there was a failure to separate the charges paid for services upon the merits of the case from those rendered in connection with the injunction proceedings; also that there was a

failure to apportion the fees paid for the services rendered to Mr. Mulvane from those rendered to the other defendants.

Let us consider these objections.

The case was tried by the plaintiff upon the theory that he was only entitled to recover the attorneys' fees paid by him for services rendered in connection with the injunction part of the case. He claimed nothing more and his testimony was introduced in accordance with this idea. To make this plain we will quote some of the testimony in the case:

Joab Mulvane: (p. 177.) "Q. You said in answer to a question propounded by Mr. Smith that you wanted to defend the suit generally. Who did you employ for the purpose of representing you on the merits of the case for the purpose of defending the suit generally?

A. Mr. A. L. Williams.

Q. Was he the only one?

A. Yes, sir; on the merits of the case generally. The employment of all the other attorneys except Mr. Williams was in the preliminary, or in the matter involved in the injunction, and when that was accomplished I employed Mr. Williams, as the suit was retained, a suit for damages, against me on the part of the plaintiffs. I employed Mr. Williams to go on with the suit as to its merits; and he is the only one."

(P. 173.) "Q. Were any of the attorneys other than Mr. Willliams employed to represent you on the merits of the case?

A. No, sir.

Q. Did they appear in the case after the disposition of the injunction?

A. No, sir; not to my knowledge.

Q. Did they charge you for any services after the temporary injunction was dissolved or for anything other than services connected with the injunction?

A. No, sir; the amounts paid them was solely for the injunction."

See, also, pages 122, 123, 125, 127, 128, 129, 130.

A. A. HURD: (p. 184.) "Q. State whether or not you and Mr. Dunlap were employed by Mr. Joab Mulvane in the case of Wescott and Hanson against Mulvane and others pending in the United States Circuit Court for the District of Kansas.

A. We were.

Q. State for what Mr. Mulvane employed you gentlemen in that case.

A. To assist in getting rid of the temporary injunction which had been granted in the federal court to restrain him from turning over the stock of The Topeka Water Works Company to the firm of Coffin and Stanton in New York, to whom he had contracted to sell and deliver it.

Q. Did Mr. Mulvane employ you to represent him on the merits of the case outside of the injunction matters?

A. Why, no, sir; not at that time. The object of the employment was wholly to get rid of the temporary injunction.

Q. After the injunction was got rid of, who continued in charge of the case?

A. I don't know. I quit it after that; did not have anything to do with it after that.

Q. Is that true of Mr. Dunlap, also?

A. I think so; yes, sir. If we rendered any services it was something very slight, something we never made any charge for. We might have done some little thing after the order was made by Judge Caldwell, dissolving the temporary injunction, but never made any charge for it.

Q. Then the charge which you and Mr. Dunlap made was for services exclusively in connection with the injunction proceedings in the case?

A. Yes, sir; in connection with the dissolution of the temporary injunction."

A. L. WILLIAMS: (p. 253.) "I was employed by Mr. Joab Mulvane in the case of *Wescott and Hanson vs. Joab Mulvane et al.*, pending in the Circuit Court of the United States for the District of Kansas, to assist in procuring a dissolution of the temporary injunction against Mr. Mulvane in that case. In pursuance of that employment I, together with other attorneys, appeared for and represented Mr. Mulvane, and succeeded in obtaining a dissolution of the injunction. For the services rendered by me to Mr. Mulvane in procuring the dissolution of the temporary injunction in that case, and for no other services, I charged Mr. Mulvane $3,000, which amount he paid me. I also represented Mr. Mulvane upon the merits of the case, but charged a separate fee therefor, which had nothing to do with the services rendered in connection with the temporary injunction. In my opinion the fee charged by me in procuring a dissolution of the temporary injunction was a reasonable fee for the services performed."

See, also, testimony of Eugene Hagan, pages 238 and 239, and of J. D. McFarland, pages 248 and 249.

It thus appears that the attorneys' fees for which we prayed judgment were all paid for services rendered in connection with the injunction proceedings exclusively. The fee paid A. L. Williams for his services upon the merits of the case is not included in our estimate of damages.

But counsel say that the record shows that answers and pleas were filed by Mulvane's attorneys, and that these pleadings were necessarily related to the merits of the case; also that a couple of papers which were filed in the case after the injunction was disposed of were signed by some of the attorneys other than Mr. Williams.

As to the answers and pleas, it is apparent that it was perfectly proper to file them for the sole purpose of aiding in the dissolution of the temporary injunction. The testimony shows that Mulvane's attorneys considered it a wise thing to do (pp. 190, 191), and no careful lawyer would undertake to contradict them. The court will also note that had it not been for the pleadings filed in the case Judge Caldwell might not have assumed jurisdiction of it. His reason for doing so appears in the order dissolving the injunction, in the following language:

"And it further appearing that the court grant-

ing the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject." (See page 88 of "Exhibit A.")

As to any paper placed on file with the signatures of these attorneys after the dissolution of the injunction, it appears that no charge was made or ever would be made for anything done in connection with those papers. The charges were only intended to cover services relating to the injunction part of the case.

But it was not necessary to have the attorneys who testified upon this subject go into these details in order to lay the foundation for a verdict covering the value of their services. In making their objections counsel lose sight of the fundamental principles governing the allowance of attorneys' fees under such circumstances. The instructions of the court upon the point that fees were only to be allowed for services in connection with the injunction are clear and explicit, and no complaint is made of them upon that score. (See instructions numbered 7, 8, 9 and 10, pp. 313, 314.)

The record shows the exact amount of work done by the attorneys in the case. Every paper on file and every step taken in the case is shown

in the printed record filed in the Circuit Court of Appeals, which is attached to the case-made in this case. That record is supplemented by the oral testimony taken in court detailing the amount and nature of the work done by Mr. Mulvane's attorneys.

Now, without the testimony of a single witness as to the value of attorneys' fees, the jury had the power to determine from the record just what they would allow Mr. Mulvane for the fees paid by him, in connection with the injunction part of the case. They had the right to take the testimony of the lawyers and experts for what it was worth and to believe as much of it as they saw fit. They could disregard all such testimony and base their judgment upon the work actually done, in accordance with their own views as to what such work was worth. If the witnesses did not properly apportion the fees, the jury could do so. They had all the facts before them, as well as the instructions of the court, and that was sufficient. If in their opinion the value of the services for preparing the answers and pleas should have been apportioned between the case on its merits and the injunction proceedings, it was their duty to make the apportionment, and having the instruc-

tions before them and all the facts, the presumption is that they did so.

The law upon this subject is well settled in Kansas and we will call attention to the cases.

In the case of *Anthony vs. Stinson*, 4 Kan. 221, the opinion of the court upon this subject reads as follows:

"IV. Certain lawyers having testified as to the value of the legal services rendered by the plaintiffs, the court instructed the jury that '*Such witnesses* are supposed to be better qualified to put a value upon such services than the jury, none of whom may have any personal knowledge of the nature of the business in which they have been performed. *Such testimony is the guide of the jury* in finding the amount justly due, and in this case you must take the testimony of these witnesses, and be governed by it, in finding the value of the services rendered by Stinson & Hurd.'

"We do not so understand the law of jury trials. It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict, but the *jury* must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given to it in making up the verdict. The testimony of *experts* or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury can not be required by the court to accept, as matter of law, the *conclusions* of the witnesses instead of

their own; and we think the court below erred in this part of its charge. Nor was this error cured when, upon the request of the defendant's counsel, that the court should instruct the jury 'that they should not be governed *alone* by the evidence of the witnesses offered to prove the value of the services, but that they should also take into consideration all the circumstances of the case, and all the surroundings, such as the character of the cases in which they were performed, the time employed, etc., the court responded that all the circumstances were before the jury, and were to be considered by them; and that, in the instructions given the jury, it was only intended to charge them that, in finding the value of the services rendered, *they must not consider their judgment better than the judgment of the witnesses who had testified as to their value.*

"This language seems to be a repetition in substance of the former charge which we have commented on as objectionable. Its obvious import is that the jury are to pay particular and special deference to the statements of the legal gentlemen who gave testimony as to the value of the legal services, or, in effect, to accept the *conclusions* of those gentlemen as their own. It substitutes the judgment of the witnesses for the judgment of the individual jurors; while the true theory of jury trials regards the opinion of such witnesses as *facts*, to be considered and weighed like other facts and circumstances of the case. Thus, if Attorney A testified that the services rendered were, in his judgment, worth $1,000, and Attorney B swore he considered them worth only $50, while it appeared from other testimony that the services required but a moderate expenditure of time and effort, we think that an unprofessional juryman should take the fact that Lawyers A and

B swore as they did, and compare that fact with the time spent and the other circumstances proved, tending to fix the value, and make up *his own* judgment.

But under the instructions given in this case, jurors would not have felt themselves at liberty, we apprehend, to do this, and consequently, in rendering their verdict, they may be regarded as registering the opinion of the professional witnesses rather than their own."

In the case of *Missouri River R. R. Co. vs. Richards*, 8 Kan. 101, a question arose in regard to the value of the services of a clerk of a corporation. In commenting upon the instructions this court, through Mr. Justice Kingman, used the following language:

(P. 110.) "A part of the charge to which objection is made is this: 'The jury can take into consideration their own general knowledge in assessing plaintiff's damages.' The jury are always in a case, as we understand the law, to use the knowledge and experience they are supposed to possess in common with the generality of mankind in making up a verdict. As we understand it, this instruction goes no farther than this. On questions of damages, the exercise of this power is frequently one of the means of coming to a conclusion. Where witnesses are supposed to have a peculiar skill and judgment, upon a particular subject their opinions as to the amount of damages are sometimes allowed to go to a jury for the purpose of supplying the supposed want of experience and knowledge of the jury. *Where such witnesses are not produced the jury must use their own judgment.* We do not know of a

single decision against this doctrine. It is not the knowledge that the jury have of this particular case that they are permitted by the court to apply, but that general knowledge they have in common with the rest of mankind. (See 1 Greenl. on Ev. sec. 364, note, and authorities referred to; *Chicago vs. Mayor*, 18 Ill. 360; *State vs. Barrow*, 37 Vt. 62, where the court held that a jury might take into consideration their general knowledge that ale was an intoxicating liquor; *Parker vs. Boston*, 15 Pick. 209; *Murdock vs. Summer*, 22 Pick. 158.) 'That general knowledge that a man can bring to the subject a juror may use, but if he has any particular knowledge on the trade he must be sworn.' (32 Eng. Com. Law, 670.) The instruction under consideration goes no further."

The same point was before this court in the case of *Bentley et al. vs. Brown*, 37 Kan. 14, and the court, through Mr. Justice Johnston, declared the law to be as follows:

"The complaint of the plaintiffs in error is, that the court disregarded the testimony in the findings which it made. There was a long list of charges for legal services which ran through a period of about two years, upon each of which the court found specially as to the nature and extent of the services rendered, and the value of the same. Several attorneys were called, who testified as experts in regard to the value of the services rendered, and it is now contended that the court erred in placing a lower estimate upon the value of the services than was done by the professional witnesses produced by the plaintiffs in error. The judge or jury trying the question of the value of professional services is not bound to accept as conclusive the opinions of the professional witnesses.

In this case there was considerable testimony produced besides the opinions of the experts; and their opinions respecting the value of the services were not at all harmonious. *There were before the court the terms of employment, the character of the litigation in which the services were rendered, the manner in which the services were performed, and the benefits resulting to the defendant in error from the services. It was the duty of the court to consider all these matters in determining the value of the services.* The court could not abdicate the duty of exercising its own judgment, and blindly accept the judgment of the experts. The opinions of professional men, who are conversant with the nature and value of legal services, are entitled to great weight, but such opinions are not binding or conclusive. They should be considered in connection with all the other testimony and circumstances of the case; and the court or jury trying the fact must not only weigh the conflicting opinions of the witnesses, but must use and apply its own general knowledge and judgment in the light of the testimony, to determine the value of the services. (*Anthony vs. Stinson*, 4 Kan. 211; *Head vs. Hargrave*, 105 U. S. 45; *Rose vs. Spies*, 44 Mo. 20.)"

In the case of *Head vs. Hargrave*, 105 U. S. 49, Mr. Justice Field, who delivered the opinion of the court, used the following language:

"It was the province of the jury to weigh the testimony of the attorneys as to the value of the services *by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying it to their own*

experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment *of the facts on which those opinions were given.* The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they can not act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the

light of their own general knowledge; they should control only as they are found to be reasonable."

As to the services rendered the other defendants the instructions of the court are very explicit. They read as follows:

"15. It is claimed on behalf of defendant in this case that in the injunction suit in the federal court there was a number of defendants besides the defendant Mulvane; that all of the defendants in said suit except the defendant Mulvane released the defendant in this suit from any liability to them growing out of the granting of the temporary injunction. And it is further claimed that the services rendered by the attorneys representing the defendants in the injunction suit were employed to and did represent all of said defendants and that the amounts paid by Mulvane were paid on account of and for services rendered for all of the defendants in the injunction suit.

"16. The evidence in this case shows that all of the other defendants in the injunction suit have released all claims for damages growing out of the granting of said injunction, and therefore I instruct you that Mulvane could not recover in this action for any money paid out on account of services rendered for the other defendants in said suit. Mulvane must be confined in this action, and can only recover for money paid out on account of services performed for him, and can not recover for money paid to attorneys for services performed by them for other of the defendants in the injunction suit."

Plaintiff in error can find no fault with these instructions. They are as strong as he could have desired. If the jury were of the opinion, under

the testimony, that a portion of the fees charged by Mulvane's attorneys were fees which they could have properly charged against other defendants, the jury had sufficient data before them to enable them to deduct the fees thus chargeable to other defendants from the amounts paid by Mulvane and allowed to him. The jury had before them full details as to the work done in the case and the interests of all the defendants, and from them they could make the necessary calculations. The jury were also fully advised as to the basis of charging fees as given by the witnesses for the defendant. (See pp. 267, 271, 272, 277 of record).

The testimony of Mr. Mulvane and his witnesses show that the attorneys employed by him were engaged to represent his interests exclusively; that in appearing for the other defendants they did so for the sole purpose of protecting Mr. Mulvane; that no charge was made against these other defendants or ever would be, and Mulvane was looked to as their client. This is very concisely stated in the testimony of A. L. Williams, page 253 of record:

"In my efforts to procure a dissolution of the injunction for Mr. Mulvane, I appeared for some of the other defendants in the case. This was done solely for the purpose of assisting in procuring a

dissolution of the temporary injunction against Mr. Mulvane, and was done in pursuance of my employment by him. I was not employed by any of the defendants in the case other than Mr. Mulvane, performed no services at their request, have never charged any of the other defendants in the case a fee for my services in that case, and never expect to."

Joab Mulvane testified upon this subject as follows:

(P. 173.) "Q. Now, you say in answer to Mr. Smith's question that you employed these attorneys to represent you, and that in representing others they did so by virtue of your employment and represented the others incidentally. What do you mean by that?

A. I mean I employed them for myself to do whatever would be necessary in the matter; and I did not employ them for anybody else.

Q. And in representing the others incidentally, do you mean by that that it was for the purpose of protecting your interests?

A. Solely; yes, sir. * * *

Q. So far as you know they did not make any charge against the other defendants for representing the other defendants in the case?

A. Not that I know of.

Q. So far as you know, did these other defendants pay these attorneys you employed for representing them in the case in any phase of it?

A. No, sir; I think not."

A. A. Hurd testified as follows, in regard to this matter:

(P. 185.) "Q. Now, Mr. Hurd, you appeared

for other defendants in the case than Mr. Mulvane. State how that happened.

A. I think possibly my name appeared as attorney for The Topeka Water Works Company; I don't know whether it did or not, the old company; I am not certain about that. I appeared for Mr. Mulvane. I did not appear for anything else. Anything I did was for the purpose of aiding Mr. Mulvane in procuring a dissolution of this temporary injunction. I was not employed by anybody except Mr. Mulvane.

Q. Then if your name, and that of Mr. Dunlap, appears representing other defendants in the case, was it solely by virtue of your employment by Mr. Mulvane?

A. Yes, sir. We were not employed by anybody else, did not consider ourselves attorneys of anybody else, and did not make any charge against anybody else."

See, also, testimony of Eugene Hagan, page 238, and of Mr. McFarland, page 248.

When the case was here before we were urging that Mr. Mulvane could also recover the fees paid by him to Silas B. Jones, an attorney directly employed by Coffin and Stanton to represent their interests. From the testimony it appears that Mr. Mulvane agreed to reimburse Coffin and Stanton for the fees of this attorney, and actually did so. Under the decision of this court we understood that these fees could not be recovered, and so made no effort to do so upon the last trial. They were eliminated from the case.

But the connection of the attorneys employed by Mr. Mulvane, with the other defendants in the case, rests upon an entirely different basis. Mr. Mulvane employed them to represent his interests and to get rid of the injunction. In appearing for the other defendants they did so entirely in the interests of Mr. Mulvane and for the protection of his rights. They were not employed by the other defendants, made no charge against them for services, and could not legally do so if they wanted to. Their services were to Mr. Mulvane and he alone was liable to them.

We do not claim that Mr. Mulvane can recover for the services rendered by his attorneys to the other defendants. We admit that he is only entitled to the amount paid by him to his attorneys for representing his own interests. And the testimony shows that that is all he did pay them.

If as a matter of fact any deductions were proper from the amounts paid by Mulvane on account of services rendered to other defendants, the jury had sufficient information before them to make the calculations. Their instructions were full and complete on this subject, and adverse party makes no complaint about them. Under the instructions of the court, and the testimony, the jury could

have allowed plaintiff the sum of $30,000. They gave a verdict for only $25,000, and it is possible that the reduction was made by the jury on account of the supposed services of Mulvane's attorneys to the other defendants.

VII.

Plaintiff's Hypothetical Question.

Plaintiff in error complains of the hypothetical question propounded by counsel for plaintiff below to the lawyers who testified as to the value of the attorneys' services in the case. The question is a long one and counsel only point out two or three specific objections. The first objection is as to that part of the question which reads as follows:

"Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that, if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted.

"To enable him to carry out his contract with Coffin and Stanton and others, and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted."

The second objection is on account of the reference in the hypothetical question to the interest of Wescott and Hanson in the contract they were negotiating. The third objection is that the hypothetical question assumed that Mulvane was the only party in interest; "that all of the services were rendered in the dissolution of the injunction and called for no apportionment of the cost of these services between the parties defendant resisting the injunction and seeking its dissolution."

We will answer these objections in their order:

First. As to that part of the hypothetical question relating to the effect of the injunction upon Mulvane from a financial standpoint.

In the case of *Ottawa University vs. Parkinson*, 14 Kan. 162, this court through Kingman, C. J., thus stated the elements which should be considered in fixing the value of attorney's fees:

"It is claimed that the premises on which the witness based his estimate of the value of the services rendered are erroneous; that he had no right to consider 'the amount in controversy, and the legal questions involved, and the general importance of the case,' in making his judgment of the value of the services. But we think these were all proper and important elements in determining the value of the services. We know that an attorney is bound to fidelity to his client as much when

the amount is one dollar as when it is a million. His obligation is not changed. But it is in the knowledge of every professional man, that when great interests are confided to his care he is expected to use the utmost diligence in the preparation of the case. He is not expected to, nor does he limit his services by the rule of ordinary care and skill that governs him in an ordinary case. So in *Duncan vs. Yancy's Ex'rs*, 1 McCord, 149, the court held that the great value of the property in contest, and the doubtful nature of the right to be tried, were proper and important elements in determining the value of the services."

In the case of *Bentley vs. Brown*, 37 Kan. 15, this language was used:

"There were before the court the terms of employment, the character of the litigation in which the services were rendered, the manner in which the services were performed, the time occupied, *and the benefits resulting to the defendant in error from the services*. It was the duty of the court to consider all these matters in determining the value of the services."

In this case the suit was filed and a restraining order issued just five days before Mr. Mulvane was to carry out his contract with Coffin and Stanton and Woodbury and Moulton, for which he was to receive $550,000. He was prevented from doing so by the injunction obtained by complainants in that suit. The hearing upon the application for a temporary injunction was set for February 12, which was beyond the time set for the delivery

of the stock to Coffin and Stanton and Woodbury and Moulton. To enable him to gather in the capital stock of the Water Company, and thus to meet his contract, he had assumed obligations which he had a right to believe would be met and liquidated with the money he was to receive upon making delivery of the stock. If he could not deliver the stock he could not obtain the money with which to pay these outstanding obligations, and with the possibility of a temporary injunction tying up indefinitely the deal with Coffin and Stanton, financial ruin stared him in the face. Let us quote from Mr. Mulvane's testimony upon this proposition:

(P. 174.) "Q. Now, Mr. Mulvane, you spoke about being bankrupt or ruined if this temporary injunction had not been dissolved in a short time after it was granted. I wish you would state what, if any, obligations you incurred in transferring these options into actual purchases of stock after the restraining order was issued.

A. I assumed obligations by reason of this transaction in the amount of $340,000. I borrowed of the banks $27,000. I gave my notes to various persons for the purchase of stock or had my notes out for $263,000 or thereabouts. I had received from Coffin and Stanton $50,000, so that I had in this business and was liable for $340,000.

Q. And those obligations were incurred for what purpose?

A. For the purpose of carrying out my contract

with Coffin and Stanton and turning over to them the property, the stock.

Q. Well, they were incurred for the purpose of enabling you to get possession of the stock so you could comply with the contract?

A. Yes, sir.

Q. Now, Mr. Mulvane, I wish you would state to the jury whether or not you would have been able to meet those outstanding obligations if the injunction had been continued in force say until the next term of court?

A. I don't see how I could; I think I could not.

Q. How were those obligations secured, what evidence did you give of those obligations that you assumed?

A. Notes for short time.

Q. How long did they run?

A. Thirty, sixty and ninety days; mostly short periods. I think perhaps I had one or two as long as six months.

Q. What did you say the total amount of these obligations were?

A. $340,000. That is not including the $50,000 which I had of Coffin and Stanton, which I was liable to be called upon to return to them if I failed to comply with my contract, and was also liable to suit for damages.

Q. What did you have to meet these obligations in the event of being unable to collect the money due you from Coffin and Stanton and Woodbury and Moulton?

A. Well, I had no ready means; I had some property.

Q. Was it valuable enough to meet these obligations?

A. No, sir; it would not have been.

Q. To what extent could you have met these

obligations by other property which you had then at that time?

Q. Well, that is hard to answer, but I think it would have been impossible to meet the emergency.

Q. Then if this temporary injunction had not been dissolved you would have found it impossible to meet your outstanding obligations?

A. That was the feeling I had about it. I felt so and I am quite sure and satisfied that I could not have done it.

Q. Is that what you meant when you said you would have been ruined if the temporary injunction had not been dissolved?

A. Yes, sir."

Besides all this there was the possibility of a damage suit with Coffin and Stanton and Woodbury and Moulton if he was unable to carry out his contract with them. Time meant a great deal to Mr. Mulvane just then. If he had been a Vanderbilt, so that he could have waited until the termination of the suit on the merits without its having any particular effect upon his solvency, he might have gone ahead in the ordinary manner and allowed the case to take its course without making any strenuous efforts to have the temporary injunction set aside. But he was not a Vanderbilt. Practically his whole fortune was tied up in this transaction, so that if the injunction had been indefinitely prolonged he would have been unable to

meet his financial obligations, and would thus have become what we designate in general parlance, a "bankrupt." These were matters which Mr. Mulvane was in duty bound to consider in determining the course to be pursued by him in employing attorneys to defeat the injunction. He had to get rid of the injunction "quick," or he was gone. He therefore employed a large number of attorneys, hoping that their combined judgment, industry and influence would put him in a position to protect his financial standing.

Now, in considering the propriety of the employment of a considerable number of attorneys and the payment of large fees to them, did not the jury have a perfect right to take into consideration the possible results of the litigation upon Mr. Mulvane's financial standing? If as a matter of fact the long continuance of the injunction would have bankrupted him, was it not within the province of the jury to consider that fact in connection with the attorney's fees paid by Mr. Mulvane in his efforts to get rid of it? Knowing that their client might be financially ruined if their efforts were unsuccessful, and realizing that results turned upon rulings made upon preliminary motions, heavier burdens were necessarily cast upon Mul-

vane's attorneys and they had the right to charge larger fees accordingly. We refer upon this point to the case of *Selover vs. Bryant* (Mich.), 56 N. W. 58, and quote the following from the opinion:

"The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiff) 'to Mrs. Bryant,' should be considered by the jury. There was no error in this. The court did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things, the importance and results of the case are to be considered. *The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety and effort demanded of and to be borne by the attorney, and should not be disregarded in their bearing upon the question of the value of such services.* (*Eggleston vs. Boardman*, 37 Mich. 14.)"

Second. As to the reference in the hypothetical question to the interest of Wescott and Hanson in the contract.

It is claimed that this reference is not sustained by the facts. That part of the question relating to them reads as follows:

"The complainants, Wescott and Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of The Topeka

Water Company stock; they were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott and Hanson represented refused to make the $60,000 payment in accordance with the terms of the agreement."

For the purpose of showing that this part of the hypothetical question was based upon the testimony we will refer briefly to the record.

Asa P. Potter testified, page 149 of "Exhibit A," that he was President of the Maverick National Bank of Boston; that Mr. Hanson was an employé of the bank; that Mr. Wescott was an expert in water bonds and water works; that the bank was negotiating for the purchase of the Springfield works in Missouri and that Messrs. Wescott and Hanson went west for them, Mr. Hanson to consider whether the bonds could be negotiated, and Mr. Wescott to determine whether the works could be bought at a price within Mr. Hanson's judgment. On that trip Wescott and Hanson went to several places—Topeka being one of them. They entered into negotiations with Mulvane for the purchase of The Topeka Water Works and duly reported in regard to them to Mr.

Potter. In short, Mr. Potter was kept advised of everything in connection with the negotiation.

On cross-examination Mr. Potter was asked this question:

(P. 150.) "Q. You were then, as I understand, Mr. Potter, to furnish all the money for this transaction?

A. Yes, sir."

Mr. Wescott was interrogated on pages 124 and 125 of "Exhibit A" in regard to conferences had with his so-called "associates" after the preliminary agreement of December 14th. In the conference the "associates" were informed that an agreement had been made with Mr. Mulvane and that he was to have $60,000. Mr. Wescott testified that Mr. Potter said the money was ready and he directed the cashier to pay it to Mr. Wescott and take his receipt therefor. It was after this conference that Wescott and Hanson refused to put up the $60,000 unless the stock was first turned over. On page 125 of "Exhibit A" these questions were asked:

"Q. 84. Up to the time that the agreement 'Exhibit ..' was made, being the one which you all signed, had you disclosed to Mr. Mulvane the fact that any one was associated with you in this enteprise except your co-plaintiff?

A. Yes, sir; we went over all that matter in Topeka, showing Mr. Mulvane what *we* had done

in Springfield, Mo., by the actual purchase of that plant, and that it was in practical operation, and also that *we* were in negotiation for other plants and had a syndicate of gentlemen who were connected with us, of which we were two of the principals. I gave him the address of the Casco Bank, Portland, Maine, as to my ability to carry out any agreement into which I entered.

Q. 85. I am not asking you about that, but as to anything you said to him in regard to your associates in this enterprise.

A. Yes, sir.

Q. 86. Did you name any of them?

A. I think not.

Q. 87. What is the nature of that syndicate, Mr. Wescott.

A. The nature of that syndicate?

Q. 88. Is it a corporation or a private concern?

A. A private concern.

Q. 89. Is it in the nature of a partnership?

A. No, sir; associates. For instance, a few gentlemen come together and say, 'We will purchase—gentlemen say to me, Mr. Wescott, if you will negotiate for water works and operate them, on the condition that you will buy them and operate them, we will go in with you to furnish our portion of the money with you to purchase any plants that you will recommend.' On that understanding I went ahead and purchased, as we supposed, the Springfield and also the Topeka."

From this testimony it appears that the Topeka works were to be purchased by the same parties who had purchased the Springfield works, and from Mr. Potter's testimony it seems that the

Springfield works were purchased by the bank of which he was president. It is plain from the testimony also that the bank was to furnish all the money to carry out the transaction with Mr. Mulvane; that Mr. Hanson was an employé of the bank and that Mr. Wescott was engaged by it in at least one case to act as an expert in water bonds and water works.

It is a fair inference from these facts that Wescott and Hanson were representing the Maverick Bank in this transaction and that they were not to invest a dollar of their own money in the deal.

These facts were all before the jury and we had a perfect right to embody them in our hypothetical question propounded to the experts.

The rule with reference to the facts embodied in hypothetical cases is thus stated by this court in *Medill vs. Snyder*, 58 Pac. 965:

"We find nothing substantial in the objection to the rulings on evidence. A number of extended hypothetical questions were submitted to expert witnesses, and it is contended that they did not correctly state the facts brought out in the evidence. Our examination of the record leads us to the opinion that they were within the range of the testimony offered by the parties attacking the will. While the proof in support of some of the facts was slight, 'a hypothetical question may be based upon any assumption of facts which the testimony

tends to prove according to the theory of the examining counsel.' (8 Am. & Eng. Enc. Pl. & Prac. 757.) There appears to have been some evidence sustaining the assumed facts, and we can not say that the questions were objectionable in form."

Third. As to the assumption that Mulvane was the only party in interest, etc.

In regard to this matter the hypothetical question recited the facts just as shown by the testimony. It reads as follows:

"There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such employment appeared for them, in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction, and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case."

VIII.

The Verdict Was Not Excessive.

The verdict was no larger than it should have been. It would be difficult to find a case exhibiting a more wanton disregard of the rights of a defendant than is shown by the record in the suit of *Wescott and Hanson vs. Mulvane*. Knowing

that they had refused to comply with the terms of the contract of December 14th by making the $60,000 payment required by it, and that therefore they had no contract to enforce, and knowing, as complainants must have known long before the injunction was dissolved, that Woodbury and Moulton were necessary parties defendant, and therefore that the federal court had no jurisdiction of the cause, they nevertheless obtained and held in force an injunction which prevented Mr. Mulvane from carrying out his contract with Coffin and Stanton, involving more than half a million dollars. They resisted to the last every effort made to dissolve the injunction, and kept Mr. Mulvane in a most precarious condition and in most fearful suspense from the 5th of February until the 7th of the following April. They were advised of the extraordinary efforts he was making to get rid of the injunction; they knew of the lawyers who represented him, and they could not help but realize that in a case of that magnitude Mr. Mulvane would be compelled to pay them large attorneys' fees. Yet they clung tenaciously to their injunction.

They understood that a suit for damages would have afforded them a complete and adequate rem-

edy for any damages actually suffered, but that would not do. They wanted to tie Mr. Mulvane up and bring him to their terms. The chances were that their temporary injunction would remain in force until the end of the litigation, and that was a long ways off. Mr. Mulvane could not possibly hold out that long. The prospect of getting Judge Caldwell to take up a matter in which Judge Foster was acting was very slight, and it seemed as though it would be impossible for Mr. Mulvane to shake off the burden resting upon him, illegal though it was. A continuance of the injunction until the end of a long-winded chancery proceeding meant financial ruin to Mr. Mulvane, and with his future in their hands why should not Wescott and Hanson "put the screws to him" until he became submissive and willing to accede to conditions imposed by them. They were cruel and merciless and pursued their unfair advantage to the very end. They took great chances, but success meant large profits. Until the temporary injunction was granted and a bond filed they assumed no risk; after it was granted the prospect of bringing Mr. Mulvane to their terms seemed almost certain. Judge Foster warned them, however, of what might possibly be in store for them

when he granted the temporary injunction. This is what he said:

(P. 76 of "Exhibit A.") "Of course this may be somewhat of a risky experiment for the complainants in this case, because they have certainly got to give a bond for all damages that the parties sustain. I am rather impressed with the belief that there is a proper and adequate remedy at law; that is, I do not see any serious obstacle in the way of it myself. But yet I must concede that the complainants have the right to come in here and insist, if the law gives it to them, upon a specific performance of this contract."

But with a temporary injunction in force lasting through the litigation, Wescott and Hanson had no fear of a suit upon the injunction bond. Mr. Mulvane was in their power, and Judge Foster's warnings could not disturb their tranquillity. They were perfectly willing to have him point out imaginary dangers, *provided* he would grant them a temporary injunction.

An unexpected change took place, however—one of those inexplicable things that will happen at times, even in a lawsuit. As the result of a sort of flank movement, for which they were unprepared, the injunction was dissolved and with it the clutch which they had so long maintained upon Mr. Mulvane.

This little speculation of Wescott and Hanson cost Mr. Mulvane a sum of money which, with interest to the date of the verdict amounted to $30,000. He should have been reimbursed for every cent of it. The jury allowed him only $25,000 and he is consequently the loser by $5,000. It was no pleasure to Mr. Mulvane to be compelled to pay out these large sums of money, and it would have been much more satisfactory to him if he had found lawyers to be less expensive luxuries. But he had employed *good* lawyers—men who had the courage to charge fees in some measure commensurate with the services rendered—and he had no alternative but to pay their charges.

Now, what excuse can be given by the sureties upon the bond for not reimbursing Mr. Mulvane for these moneys actually paid out by him in good faith? They understood the nature of the obligations assumed by them, and certainly were not so foolish as to incur them without adequate security. They practically stand in the shoes of Wescott and Hanson. Wescott and Hanson played out their game at Mr. Mulvane's expense, and there is no reason why those expenses should not be made good to him.

Be that as it may, the reasonableness of the attorneys' fees charged, and of the expenses paid by Mr. Mulvane were questions for the jury and their decision upon those questions is final.

We respectfully submit that the judgment of the lower court should be affirmed.

A. L. Williams,
N. H. Loomis,
Attorneys for Defendant in Error.